90-767

Supreme Court, U.S.
FILED
NOV 15 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 90-

In the Supreme Court of the United States of America

October Term, 1990

CABLE NEWS NETWORK, INC., and
TURNER BROADCASTING SYSTEM, INC.,
Petitioners,

v.

MANUEL ANTONIO NORIEGA and
UNITED STATES OF AMERICA,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a prior restraint against telecasting tapes of conversations by a criminal defendant with his legal defense team is inconsistent with the First and Fifth Amendments?

2. Whether the District Court violated petitioners' rights under the First Amendment by requiring petitioners to prove the tapes they possessed did not contain information prejudicial to the defendant?

3. Whether the prior restraint entered in this case was unconstitutionally vague in violation of the First and Fifth Amendments?

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioners Cable News Network, Inc., and Turner Broadcasting System, Inc.,[1] respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit, entered in *United*

[1] Petitioner Cable News Network, Inc., is a wholly-owned subsidiary of petitioner Turner Broadcasting System, Inc. *See* Rule 29.1. Throughout this Petition, the petitioners will be collectively referred to as "CNN."

States v. Noriega, Nos. 90-5926, 90-5927, and 90-5932, on November 10, 1990.

OPINIONS BELOW

The decision of the Court of Appeals for the Eleventh Circuit, issued on November 10, 1990, has not yet been reported. It is reprinted in the Appendix hereto, at pages 1a-17a. The decisions of the United States District Court for the Southern District of Florida issued on November 8 and November 9, 1990, have not been reported. They are reprinted in the Appendix hereto, respectively, at pages 19a and 25a.

JURISDICTION

The judgment and opinion of the United States Court of Appeals for the Eleventh Circuit was entered on November 10, 1990. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1), which grants power to review all "[c]ases in" the courts of appeals. *Nixon v. Fitzgerald*, 457 U.S. 731, 741 (1982).

This case was properly "in" the Court of Appeals as an appeal from an order granting a preliminary injunction pursuant to 28 U.S.C. § 1292(a)(1).[2] Although the District Court

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[2] The District Court had jurisdiction as a result of the United States Government's prosecution of Noriega, the former Panamanian leader, for drug conspiracy charges. The *Noriega* case, in which the defendant was located and apprehended by United States armed forces during the invasion of Panama in December, 1989, has been the subject of several District Court decisions. *See United States v. Noriega*, No. 88-0079-CR-Hoeveler (S.D. Fla. Oct. 9, 1990) (1990 Westlaw 156552); *United States v. Noriega*, No. 88-0079-CR-Hoeveler (S.D. Fla. Sept. 24, 1990) (1990 Westlaw 142524); *United States v. Noriega*, No. 88-0079-CR-Hoeveler (S.D. Fla. June 14, 1990) (1990 Westlaw 95529); *United States v. Noriega*, No. 89-0079-CR-Hoeveler (S.D. Fla June 8, 1990) (1990 Westlaw 156541); *United States v. Noriega*, 683 F. Supp. 1373 (S.D. Fla. 1988); *United States v. Noriega*,

has at times characterized the prior restraint appealed from as a temporary restraining order, which as a general rule is not appealable under Section 1292(a)(1), the prior restraint is appealable under that section pursuant to *Sampson v. Murray*, 415 U.S. 61 (1974), a case almost on all fours with this one.

The district court in *Sampson* entered a temporary restraining order granting injunctive relief until the defendant produced a witness to testify, which the defendant refused to do. *Id.* at 66-67 & 67 n.8. After observing that the order's designation as a temporary restraining order could not shield it from appellate review, *Sampson* held that because the order extended beyond the ten-day period allowed by Fed. R. Civ. P. 65(b), an "adversary hearing" had been held on the matter, and the court's basis for issuing the TRO had been "strongly challenged," the order should be treated as an appealable preliminary injunction. *Id.* at 86-87. In this case, although the District Court's Order had for a time a nominal life of ten days, it has now been indefinitely extended, and this Court can rule on this Petition for Certiorari.[3] Moreover, the District Court held an adversary hearing on the matter, and its ruling is strongly challenged by CNN. The orders thus are appealable under Section 1292(a)(1).

The District Court's orders are appealable for the further reason that they cause petitioners ongoing irreparable harm by infringing their First Amendment rights. *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *Nebraska Press Ass'n v. Stuart*, 423 U.S. 1327, 1329 (Blackmun, Circuit Justice 1975). The courts and commentators recognize that a temporary restraining order is appealable when it will do irreparable harm. *E.g., San Fran-*

No. 88-0079-CR-Hoeveler (S.D. Fla. Feb. 4, 1988) (1988 Westlaw 168666).

[3] This was further confirmed in a hearing before the District Court on November 13, 1990. A transcript of this hearing is in preparation and will be included in a Supplemental Appendix.

cisco Real Estate Investors v. Real Estate Inv. Trust, 692 F.2d 814, 816-17 (1st Cir. 1982); 16 C. Wright, A. Miller, E. Cooper, & E. Gressman, *Federal Practice & Procedure* § 3922 at 37-38 (1977); *see also Sampson*, 415 U.S. at 86 n.58, *quoting Pan American World Airways, Inc. v. Flight Eng'rs' Int'l Ass'n*, 306 F.2d 840, 843 (2d Cir. 1962) (appeals are permitted under § 1292(a)(1) because of " 'the possibility of drastic consequences which cannot later be corrected' ").

Alternatively, if the District Court's orders were not appealable under Section 1292(a)(1), this case was properly "in" the Court of Appeals under the All Writs Act, 28 U.S.C. § 1651(a). The Court of Appeals was well within its discretion in treating petitioners' notice of appeals as a petition for a writ of mandamus.[4] This Court's certiorari jurisdiction extends to orders of the courts of appeal denying writs of mandamus. *E.g., Mallard v. United States District Court*, 109 S. Ct. 1814 (1989).[5]

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[4] The courts of appeal routinely treat notices of appeal as petitions for writs of mandamus. *E.g., In re Harmon*, 425 F.2d 916, 918 (1st Cir. 1970); *Seguros Banvenez S.A. v. S/S Oliver Drescher*, 715 F.2d 54, 56 n.1 (2d Cir. 1983); *In re Washington Post Co.*, 807 F.2d 383, 388 (4th Cir. 1986); *Wilkins v. Erickson*, 484 F.2d 969, 971 (8th Cir. 1973); *National Org. for Reform of Marijuana Laws v. Mullen*, 828 F.2d 536, 541 (9th Cir. 1987).

[5] If the District Court's orders are not reviewable under § 1292(a)(1), this was an appropriate case for the issuance of a writ of mandamus. The District Court's granting of a prior restraint, as shown below, constitutes the sort of " 'clear abuse of discretion,' " *Mallard v. United States District Court*, 109 S. Ct. at 1822, that justifies issuance of the writ. Moreover, if the orders are not reviewable on appeal, petitioners have no alternative means of relief, making mandamus appropriate. *Id.* Finally, as in *Mallard*, the "principal reasons" for not using the writ — "the undesirability of making a district court judge a litigant, and the inefficiency of piecemeal appellate review," *id.* — are not present. The courts of appeal recognize that mandamus is the appropriate remedy for a prior restraint, *In re King World Productions, Inc.*, 898 F.2d 56 (6th Cir. 1990), and for other violations of the First Amendment. *E.g., Seattle Times Co. v. United States District Court*, 845 F.2d 1513 (9th Cir. 1988); *Journal Publishing Co. v. Mechem*, 801 F.2d 1233 (10th Cir. 1986).

CONSTITUTIONAL AND OTHER PROVISIONS INVOLVED

First Amendment

> Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .

Fifth Amendment

> No person shall be . . . deprived of life, liberty, or property, without due process of law . . . .

STATEMENT OF THE CASE

This case arose from CNN's investigation of possible Government misconduct in the highly newsworthy prosecution of General Manuel Antonio Noriega.

A. CNN's Investigation and Broadcast.

CNN's investigation began when it learned that the Government might be taping telephone conversations made by Noriega from his prison cell, including tapes that appeared to show that the Government had recorded communications between Noriega and members of his defense team. App. 57a. CNN then interviewed, for later telecast, a legal expert who described the impact of such recordings on Noriega's rights. The Government declined to comment on the tapes then, and it continues to decline comment on them. CNN obtained an interview in which Noriega's counsel first played a tape of attorney-client communications, confirmed they were such communications, and then played the tape again on camera. After that interview, CNN telecast its story at approximately 7:00 a.m., E.S.T., on November 8, 1990. App. 57a-70a. The listener could hear the sounds of the conversation between Noriega and his defense team in the telecast, but could not discern the words making up the conversation. App. 4a.

B. Proceedings Below.

After learning of CNN's likely telecast of the tapes, Noriega moved to enjoin CNN from broadcasting any illegally recorded telephone conversations containing privileged attorney-client communications. App. 30a. The District Court heard argument on Noriega's motion on November 8, 1990, after the first CNN telecast. While CNN vigorously opposed the motion on First Amendment grounds, the Government took no position on it.

The District Court considered whether it ought to review the taped conversations before ruling on the motion, but Noriega's lawyer replied that such a review would not be meaningful unless he disclosed his "entire defense strategy," which he refused to do. App. 81a. The District Court thereupon requested that CNN agree not to telecast any tapes pending its ruling. When CNN declined that request, the District Court issued its prior restraint by orally ordering CNN not to telecast attorney-client privileged tapes pending its ruling. When CNN's counsel asked for clarification of the order, the Court made clear that the order did not apply to "tapes that don't have anything to do with the attorney/client situation . . . . " App. 23a, 83a.

Later that day the District Court issued a written order (the "Order"), which continued what it called the "temporary injunction" barring telecast of the tapes until the court could review them, and directed CNN to produce the tapes to the court. App. 23a-24a. CNN consistently has opposed producing the tapes on First Amendment grounds. App. 94a. In an oral ruling, however, the District Court stayed the portion of the

Order directing CNN to produce the tapes; that stay remains in effect. App. 87a.[6]

The next day, November 9, 1990, the District Court issued a supplemental written order (the "Supplemental Order") holding that its prior restraint, which it now called a temporary restraining order, would remain in effect for up to ten days, or such lesser time as needed by the court to review the tapes and reach a decision on the merits. Although the District Court acknowledged that, contrary to the test for a prior restraint, "no clear and immediate harm is apparent," it restrained CNN because it found it "fundamentally unfair" for CNN to benefit from not producing tapes and thus to preclude the court from "knowing the precise contents of the speech sought to be restrained." App. 26a, 28a-29a. The District Court at the same time orally indicated that its oral stay of the Order compelling production of tapes remained in effect. App. 96a-97a.

CNN telecast a report including the tape at 6:30 p.m., E.S.T., November 9, 1990. CNN believed that the tape it had previously played to Mr. Rubino was no longer subject to the attorney-client privilege and thus that telecast of the tape was not prohibited by the District Court's orders, relying on first amendment protections and that belief.

The District Court held further proceedings the next day, November 10, after Noriega moved for a finding of contempt against CNN based on a telecast of November 9. App. 103a-107a. Subsequently, that contempt proceeding was stayed pending this Court's review. App. 136a. Although the District Court and Court of Appeals apparently believed that CNN was in contempt, CNN will contest any renewed motion for contempt, in part because CNN contends it did not telecast

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[6] Because this part of the Order had been stayed, the Court of Appeals erred in implying that CNN had willfully refused to produce the tapes in violation of the District Court's Order. App. 16a.

attorney-client privileged communications in violation of the Order.[7]

CNN filed a notice of appeal and an emergency motion for reversal and stay with the United States Court of Appeals for the Eleventh Circuit on November 8, 1990, after the District Court delivered its initial oral ruling, App. 37a-43a, and supplemented them on November 9 with notices of appeal and motions to stay and reverse the order and supplemental order of the District Court. App. 44a-53a. The Court of Appeals ordered Noriega and the Government to file responsive briefs by November 10.

In an order filed November 10, 1990, the Court of Appeals rejected CNN's motion for oral argument, dismissed CNN's notices of appeal, and, treating the notices of appeal as petitions for a writ of mandamus, refused to grant the writ and denied the motions for stay. App. 2a.

Subsequent to the action by the Court of Appeals, the District Court on November 12 and 13, 1990, entered orders extending the prior restraint until the Court rules on this Petition for Certiorari. App. 124a.

REASONS FOR GRANTING THE WRIT

This case involves an unprecedented prior restraint on publication, "one of the most extraordinary remedies known to our jurisprudence." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 542 (1976). The District Court ordered CNN not to telecast information that it had obtained as a result of its investigation about possible Government misconduct in the

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[7] The Court of Appeals indicated that it had "been advised that CNN, in disregard and defiance of the District Court's explicit restraining order, broadcast . . ." App. 5a. This observation was made without a finding in the record, and CNN contests it.

criminal prosecution of the former ruler of Panama, who was seized and brought to the United States as a result of an American invasion of Panama in December, 1989.

In upholding the District Court's injunction against CNN's telecast of news, the Court of Appeals refused to apply this Court's decisions governing the propriety of prior restraints. Consequently, the decision of the Court of Appeals stands in direct conflict with *Nebraska Press* and the other prior restraint decisions of this Court and of other federal and state appellate courts. For these reasons and because of the important public and constitutional law issues involved, this Court should exercise its discretion under Rule 10.1(a) and (c) and grant a writ of certiorari to review the decision below.

I.

THE DECISION BELOW IS CONTRARY TO *NEBRASKA PRESS* AND OTHER DECISIONS OF THIS COURT AND REJECTS THIS COURT'S PRIOR RESTRAINT JURISPRUDENCE BY PERMITTING THE DISTRICT COURT TO ENJOIN CNN'S TELECAST FOR SPECULATIVE REASONS

The District Court and the Court of Appeals made two fundamental errors of law in issuing and upholding the injunction against CNN's telecast of the Noriega tapes. First, the District Court turned the principles of *Nebraska Press* upside down by issuing a prior restraint premised upon nothing more than conjecture of possible harm and by demanding that CNN come forward with evidence to disprove Noriega's right to ban CNN's telecast. Second, the Court of Appeals upheld the prior restraint by adopting a First Amendment test that is contrary to the standards required by *Nebraska Press* and other First Amendment decisions of this Court.

A. This Court's Decisions Emphasize That Prior Restraints are Presumptively Unconstitutional and that a Party Seeking a Prior Restraint Bears a "Heavy Burden" of Proof.

As both the District Court and Court of Appeals admitted, the injunctions against CNN are a form of prior restraint, "one of the most extraordinary remedies known to our jurisprudence." *Nebraska Press*, 427 U.S. at 562. For almost sixty years, the Court has stressed the presumptive unconstitutionality of prior restraints and has held that they may issue only on a clear and unequivocal showing.

In *Near v. Minnesota*, 283 U.S. 697 (1931), the Court rejected a prior restraint against an anti-Semitic publication that disturbed the "public peace" and provoked "assaults and the commission of crime," emphasizing that such orders should be granted only in "exceptional cases." *Id.* at 716. In discussing those categories of cases, Chief Justice Hughes suggested that prior restraints might be granted only in circumstances such as a threatened publication of the sailing dates of transports or the number and location of troops in time of war. *Id.*; *see Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559 (1975) ("[i]n order to be held lawful, [the circumstances] first, must fit within one of the narrowly defined exceptions to the prohibition against prior restraints").

Four decades later, in *New York Times Co. v. United States*, 403 U.S. 713 (1971) (per curiam), the Court rejected requests for prior restraints against the publication of the Pentagon Papers, which were alleged to have been stolen from the government, and to contain highly sensitive national security

information. Particularly apposite to CNN's news coverage here, Justices Douglas and Black pointed out that:

> [t]he dominant purpose of the First Amendment was to prohibit the widespread practice of governmental suppression of embarrassing information.

Id. at 723-24 (Black, J., with Douglas, J., concurring).

Because of this "dominant purpose," the Court in *New York Times* emphasized the " 'heavy presumption against [the] constitutional validity' " of prior restraints, *Id.* at 714 (quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963)), and imposed " 'a heavy burden of showing justification for [their] imposition.' " *Id.* (quoting *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971)); *see Southeastern Promotions, Ltd.*, 420 U.S. at 559 ("The presumption against prior restraints is heavier — and the degree of protection broader — than that against limits on expression imposed by criminal penalties.").

In *Nebraska Press Ass'n v. Stuart, supra*, the Court rejected a prior restraint in a criminal case involving a claim of prejudice to fair trial rights far more compelling than that asserted here. The suppressed information in *Nebraska Press* included the defendant's confession to the crime itself; the trial was to be held in a small, rural community. Noting that the primary purpose of the First Amendment is to prevent prior restraints and relying upon the "heavy presumption against constitutional validity," the Court vacated the gag order, observing that "prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment Rights." 427 U.S. at 559. *Nebraska Press* emphasizes that "the protection against prior restraints should have particular force as applied to reporting of criminal proceedings." *Id.*

Based on these considerations, *Nebraska Press* outlined an exacting test for issuance of prior restraints in the context of criminal proceedings and emphasized that a prior restraint should issue only if it is

> clear that further publicity, unchecked, would so distort the views of potential jurors that 12 could not be found who would, under proper instructions, fulfill their sworn duty to render a just verdict exclusively on the evidence presented in open court.

Id. at 569.

B. Both the District Court and the Court of Appeals Adopted Legal Standards at Odds With This Court's Prior Restraint Cases.

The courts below departed from this Court's prior restraint authorities.

1. The Court of Appeals Wholly Ignored This Court's Prior Restraint Cases in Fashioning Its Test for Upholding the Injunction Below.

In reviewing and upholding the District Court's rulings, the Court of Appeals flatly rejected fifty-nine years of unbroken United States Supreme Court precedent. Rather than apply the exacting standards required by *Nebraska Press* and other prior restraint decisions of this Court, the Court of Appeals constructed a weaker constitutional test, fashioned from the Court's "access" cases, and then determined that the gag order imposed on CNN was not unconstitutional because it met the lower burden of proof imposed by that test. This Court has repeatedly held, however, that the right of the press to be free from prior restraints is distinct from, and to be accorded

stronger protection than, the media's right of access to governmental information.[8]

In its decision, the Court of Appeals ignored this Court's prior restraint cases. Instead, the Court of Appeals erroneously analyzed the issue as a question of the media's right of access to information about the *Noriega* case.[9] The Court of Appeals cited this Court's decision in *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 609 (1978), which concerned broadcasters' efforts to obtain access to copies of the Nixon tapes. App. 9a. Then, the Court of Appeals reasoned that since the "general public" has no "right to communications between a defendant and his counsel," and since the media are entitled to "no more information than the public," the District Court could appropriately issue a prior restraint prohibiting CNN from telecasting information it already possessed.

As a result of this fundamental legal error, the Court of Appeals' analysis mistakenly focused on the defendant's Sixth Amendment right to a fair trial, which it therefore determined was the District Court's "primary responsibility," App. 7a, without equal consideration of the right to be free from prior

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[8] In a prior restraint case, a court or other government official is attempting to prohibit the media from disseminating or publishing information the media have already obtained. In an access case, the newspaper or telecaster is attempting to obtain information that is in the government's possession.

[9] The court also ignored the factual record that was presented to it when it ruled, without benefit of any District Court determinations, that CNN had in fact "broadcast" certain information "in disregard and defiance of the District Court's explicit restraining order." App. 5a, n.5. As a result of this incorrect conclusion, the Court of Appeals criticized CNN for allegedly "appealing to our nation's judicial system for relief" while it was "at the same time defiant of that system's reasonable directions." App. 16a. In fact, contempt proceedings were later initiated, but they have been stayed, and CNN will contest any allegation of contempt, in part on the basis that it did not violate the Order by telecasting privileged attorney-client communications. App. 106a.

restraint under the First Amendment. *Cf. Gannett Co. v. DePasquale*, 443 U.S. 368, 399 (1979) (applying access analysis). The court's test thus diminished CNN's First Amendment interests and gave unnecessary weight to the concerns advanced by Noriega. As the Court of Appeals concluded, "'[i]t is better to err, if err we must, on the side of generosity in the protection of a defendant's right to a fair trial before an impartial jury'." App. 10a (*quoting Belo Broadcasting Corp. v. Clark*, 654 F.2d 423, 431 (5th Cir. 1981)).

This reasoning directly conflicts with the decisions of this Court, which have repeatedly stressed the significant distinction between the level of judicial inquiry required in determining a First Amendment "right to access" and the exacting standards which are applied in determining the constitutional validity of a "prior restraint."[10] By confusing the two, the Court of Appeals completely disregarded the commands of *Nebraska Press*, *New York Times*, *Near*, and similar cases.[11]

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[10] Very different concerns animate the two types of cases. As the Court noted in *Zemel v. Rusk*, 381 U.S. 1, 17 (1965), "the right to speak and publish does not carry with it the unrestrained right to gather information." According to the late Professor Bickel:

> Prior restraints fall on speech with a brutality and a finality of their own. Even if they are ultimately lifted they cause irremediable loss — a loss in the immediacy, the impact of speech .... A prior restraint, therefore, stops more speech more effectively. A criminal statute chills, prior restraint freezes. Indeed it is the hypothesis of the First Amendment that injury is inflicted on our society when we stifle the immediacy of speech.

A. Bickel, *The Morality of Consent* 61 (1975). *See also Nebraska Press* 427 U.S. at 609; T. Emerson, *The System of Freedom of Expression* 506 (1970).

[11] The Court of Appeals also misapplied its own case law. In *United States v. Gurney*, 558 F.2d 1202 (5th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978), cited by the court in support of the prior restraint in this case, App. 8a, the Fifth Circuit (whose precedent is binding on the Eleventh Circuit) denied newspapers and their report-

This Court first noted the significant constitutional distinction between "right of access" and "prior restraint" in *Pell v. Procunier*, 417 U.S. 817 (1974), when it stated:

> It is one thing to say that ... government cannot restrain the publication of news .... It is quite another thing to suggest that the Constitution imposes upon government the affirmative duty to make available to journalists sources of information not available to members of the public generally.

Id. at 834 (citations omitted).

Similarly, in *Gannett Co. v. DePasquale*, *supra*, which was relied upon by the Court of Appeals in upholding the prior restraint against CNN, App. 11a-12a, this Court specifically distinguished the First Amendment issues presented by access claims from the more exacting standards that govern a question of prior restraint. The Court held that the trial court's orders excluding the public and press from a pretrial suppression hearing presented a much different question than that found in a prior restraint case:

> This Court's decision in *Nebraska Press Association v. Stuart* is of no assistance to the petitioners in this case. The Nebraska Press case involved a direct prior restraint by a trial judge on the members of the press, prohibiting them from disseminating information about a criminal trial. Since "it has been generally, if not universally considered that it is the chief purpose of the [First Amendment's] guaranty to prevent previous restraints upon publication," the

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ers *access* to certain trial documents in a criminal proceeding. In holding that the news media do not have any First Amendment right of access, the court emphasized that "the trial judge here did not resort to the use of prior restraints despite the case being much publicized," 558 F.2d at 1208, and instead "employed reasonable 'remedial measures,' far short of prior restraints ...." *Id.* at 1211.

> Court held that the order violated the constitutional guarantee of a free press. The exclusion order in the present case, by contrast, did not prevent the petitioner from publishing any information in its possession. The proper inquiry, therefore, is whether the petitioner was denied any constitutional right of access.

443 U.S. at 393 n.25 (citations omitted). *See also id.* at 399 (Powell, J. concurring)[12] (excluding all members of the public "does not in any way tell the press what it may or may not publish . . . .").

2. By Issuing a Telecast Ban Without Any Evidence of Harm to Noriega, the District Court Failed to Apply This Court's Prior Restraint Standards.

Rather than "examine the evidence," as *Nebraska Press* directs, 427 U.S. at 562, to determine whether the Order would be effective and whether other alternatives might protect Noriega's rights, the District Court relied on a series of speculative inferences and possibilities — that because CNN had apparently obtained a taped conversation between Noriega and one of Mr. Rubino's employees, it may have possessed tapes of other unspecified conversations between Noriega and his defense team; that this unspecified information was proba-

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[12] Likewise, in *Richmond Newspaper, Inc. v. Virginia*, 448 U.S. 555 (1980), also cited by the Court of Appeals, App. 7a, Justices Brennan and Marshall, in their concurring opinion, recognized that "[t]he Court's approach in right-of-access cases simply reflects the special nature of a claim of First Amendment right to gather information," *id.* at 586, and that its access decisions hold "only that any privilege of access to governmental information is subject to a degree of restraint dictated by the nature of the information and countervailing interests in security or confidentiality." *Id.* at 585. Governmental efforts to restrain communication, however, are wholly different: "When so employed against prior restraints, free speech protections are almost insurmountable." *Id.* at 587.

bly protected by Noriega's attorney-client privilege, although Noriega had executed a release acknowledging that his prison telephone conversations would be intercepted and recorded by Government agents; and that these possibly privileged communications, if disclosed either to the Government (which was responsible for the taping) or to the public, might reveal statements or other information that could hamper Noriega's Sixth Amendment right to a fair trial.

By relying on speculation rather than fact,[13] the District Court ignored the teaching of *Nebraska Press*, which emphatically rejected the notion that a prior restraint could be supported by speculative concern that some harm will occur as a result of publication.[14] Although *Nebraska Press* found that the trial judge was "justified" in finding that a sensational murder trial would generate "intense and pervasive pretrial publicity" which "might impair the defendant's right to a fair trial," it held such a conclusion was "of necessity speculative" because it dealt with "factors unknown and unknowable." 427 U.S. at 562-63. Where the evil that is sought to be prevented is purely speculative, a judge cannot constitutionally impose a ban upon publication:

> Reasonable minds can have few doubts about the gravity of the evil pretrial publicity can work, but the

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[13] The Government contended that the prior restraint was necessary to preserve the status quo because neither the court nor Noriega knew what tapes CNN possessed. App. 84a-85a. "But to maintain the status quo means to forbid publication while a hierarchy of courts . . . speculates on the likelihood of adverse effects from publication and their magnitude. Linde, *Courts and Censorship*, 66 *Minn. L. Rev.* 171, 201 (1981) (footnote omitted).

[14] This principle was reaffirmed by *Gulf Oil Co. v. Bernard*, 452 U.S. 89 (1981), in which the Court held that a "sweeping restraint order" issued in a class action was an abuse of discretion and recognized that "the mere possibility of abuses does not justify routine adoption of a communications ban." *Id.* at 104.

> probability that it would do so here is not demonstrated with the degree of certainty our cases on prior restraint require.

Id. at 569.

The District Court's determination that it was "impossible to determine . . . the precise extent to which Noriega's right to a fair trial would be hampered by disclosure" thus cannot justify a prior restraint under *Nebraska Press*. App. 23a. In fact, the court compounded the constitutional error condemned by *Nebraska Press*. In *Nebraska Press*, the information that was sought to be restrained was known to be of the most highly prejudicial content — that the defendant had actually confessed to the crime — and speculation as to the *effects* of this plainly prejudicial information was held insufficient to support a prior restraint. Here, by contrast, the District Court speculated not only as to the effects of the information restrained, but also as to its content.[15]

a. In Allowing CNN to be Enjoined, The Courts Below Improperly Shifted the Burden of Proof Mandated by This Court's Prior Restraint Cases.

With any prior restraint, the party seeking to censor speech must bear the heavy burden of justifying such a draconian remedy. *Nebraska Press*, 427 U.S. at 557-59; *Southeastern*

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[15] The Court of Appeals further compounded the District Court's error by deferring to the District Court's speculations rather than conducting the searching inquiry of the record required by the principles stated in *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984). Thus, the Court of Appeals simply insisted that the trial court must be "accorded broad discretion to accomplish its primary responsibility of ensuring that the accused has a fair trial," App. 7a, thereby granting Noriega's speculative Sixth Amendment concerns absolute primacy, and ignored critical evidence that Noriega may have waived his right to insist that his prison conversations be deemed confidential.

Promotions, Ltd., 420 U.S. at 559; *New York Times Co. v. United States*, 403 U.S. at 714; *Freedman v. Maryland*, 380 U.S. 51 (1965). The District Court reversed this burden of proof by requiring CNN to come forward with the tapes and prove that they contained no prejudicial information. App. 23a-24a.

Thus, the District Court's reversal of the burden of proof is squarely at odds with this Court's decisions recognizing the heavy presumption against the constitutionality of prior restraints and the heavy burden to justify prior restraints. In effect, the District Court required CNN to come forward with evidence to persuade it *not* to impose "the most serious and the least tolerable infringement on First Amendment rights." *Nebraska Press*, 427 U.S. at 559. When the burden of proof is placed where it should be, on the proponent of the prior restraint, the District Court's orders cannot stand.

b. The Courts Below Also Ignored Petitioners' Vital First Amendment Interest in Reporting on the Noriega Prosecution and on Allegations of Government Misconduct.

The Noriega prosecution is a public event in which a United States District Court will be adjudicating drug charges against a former head of a sovereign state.[16] The fact that CNN seeks to telecast information about alleged Government misfeasance in a major criminal case involving the deposed Panamanian leader, who was apprehended and brought to Miami as a result of the United States' invasion, suggests that more First Amendment protection, not less, should be accorded its right to publish what it has learned. *Butterworth v. Smith*, 110 S. Ct. 1376, 1381 (1990) ("publication of information relating

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[16] In 1988, the District Court concluded that "Noriega is a fugitive. The court has no expectation that he will be brought into the jurisdiction to answer the charges against him." *United States v. Noriega*, 683 F. Supp. 1373, 1373 (S.D. Fla. 1988).

to alleged governmental misconduct . . . has traditionally been recognized as lying at the core of the First Amendment.").

As this Court has recognized, the First Amendment "embraces . . . the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment." *Thornhill v. Alabama*, 310 U.S. 88, 101-02 (1940). Freedom of the press includes the right "to bring to bear the beneficial effects of public scrutiny upon the administration of justice." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 492 (1975). And, as the Court noted in *Nebraska Press*, 427 U.S. at 559, "the protection against prior restraints should have particular force as applied to reporting of criminal proceedings."[17] The Court of Appeals, by rejecting this Court's prior restraint requirements, failed even to consider alternatives other than a ban of CNN's telecasts of the Noriega tapes.

c. By Contrast, the Speculative Interests Advanced by Noriega Do Not Justify a Prior Restraint on CNN.

At the core of Noriega's applications for a restraint on publication was what he described as "the duty to ensure that attorney-client conversations are not revealed without the consent of the client." Answer to Appellant's Emergency Motion to Vacate Prior Restraint at 5. According to Noriega, the right to communicate privately with counsel is of constitutional dimension and cannot be endangered regardless of what the tapes contained. App. 31a. Not only is Noriega's characterization of the privilege inaccurate, but even if it were correct, a

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[17] Unfortunately, the District Court's injunction has produced its "restrictive results at the precise time when public interest in the matters discussed would naturally be at its height." *Bridges v. California*, 314 U.S. 252, 268 (1941).

prior restraint could not serve to salvage his interest in confidentiality.

First, the privilege does not derive from an accused's constitutional right to an attorney.[18] Nor is the protection afforded the privilege absolute or unconditional, as it hinders the search for truth. *See* 8 Wigmore, *Evidence* § 2291, at 554.[19] Thus, while the federal courts and most states have codified the common law privilege in their evidentiary rules, a testimonial privilege is not a talisman that may be used to overrule the First Amendment's fundamental purpose of preventing prior restraints.

Second, regardless of the strength of Noriega's claim of privilege or what conversations are on the CNN tapes, no prior restraint could serve to salvage his interest in confidentiality. As the District Court recognized, "[t]hat purpose ... has already been frustrated by the very fact of invasion," and thus the restraint, at least as to this alleged purpose, was merely "symbolic and prophylactic." App. 20a-21a; *see, e.g., Smith v.*

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[18] *Maness v. Meyers*, 419 U.S. 449, 466(1975); *United States v. Talley*, 790 F.2d 1468, 1470-71 (9th Cir.) *cert. denied*, 479 U.S. 866 (1986); *Clutchette v. Rushen*, 770 F.2d 1469, 1471 (9th Cir. 1985). Instead, it is a creature of the common law. *See* 8 Wigmore, *Evidence* § 2290 (McNaughton rev. 1961) (modern-day privilege derived from a policy seeking to encourage full and frank discussion between client and lawyer).

[19] *See also, United States v. Pipkins*, 528 F.2d 559, 562-63 (5th Cir.), *cert. denied*, 426 U.S. 952 (1976) ("The attorney-client privilege ... is not a broad rule of law which interposes a blanket ban on the testimony of an attorney ... [and] does not embrace everything that arises out of the existence of an attorney-client relationship."); *In re LTV Sec. Litig.*, 89 F.R.D. 595, 600 (N.D. Tex. 1981) (the tension between the policies behind the privilege and full disclosure "requires a rule of construction that the privilege is to be construed 'no more broadly than is necessary to effectuate its purpose.'") *quoting Cohen v. Uniroyal, Inc.*, 80 F.R.D. 480 (E.D. Pa. 1978); *In re Grand Jury Subpoena*, 406 F. Supp. 381, 385 (S.D.N.Y. 1975) ("[T]he attorney-client privilege both serves and disserves the administration of justice.").

Daily Mail Publishing Co., 443 U.S. 97 (1979) (overturning gag order because it could not be effective); *Nebraska Press*, 427 U.S. at 562 (in considering whether to issue prior restraint, court should determine "how effectively a restraining order would operate to prevent the threatened danger"). It is the Government's interception of Noriega's prison conversations that has frustrated Noriega's claim to privilege, not CNN's actions in telecasting information about possible Government misconduct.[20]

The District Court also issued its orders in the face of substantial evidence that any attorney-client privilege that may have existed had been waived and, indeed, CNN submits that any conversations that it telecast were not privileged at the time of telecast.[21] Certainly under *Nebraska Press*, a litigant seeking to restrain the media must demonstrate the "gravity of the evil" with sufficient probability to justify the extraordinary

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[20] *See Weatherford v. Bursey*, 429 U.S. 545 (1977) (effect on defendant's Sixth Amendment rights of Government interception of attorney-client conversations). The District Court steered a somewhat uncertain course on its concern with Noriega's attorney-client privilege. Initially noting its distaste for revealing "the defendant's trial strategy and protected confidences," the court acknowledged that the damage already had been done because of the Government's decision to tape Noriega's conversations and that the purpose for protecting confidences "has already been frustrated by the very fact of invasion." App. 20a. As a result, the District Court was left only with a concern about "prevent[ion] [of] disclosure of information damaging to the defendant's case . . . ." App. 21a. But that interest can be protected through simpler, and far less intrusive, alternatives such as sequestration of the prosecution.

[21] Noriega's calls were made after he signed a waiver and was informed that his conversations would be monitored. App. 77a-78a, 141a-146a. *See Hudson v. Palmer*, 468 U.S. 517, 527-28 (1984); *Bell v. Wolfish*, 441 U.S. 520, 556-57 (1979); *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 129-30 (1977); *Pell v. Procunier*, 417 U.S. 817, 822 (1974). Moreover, Noriega's counsel listened to certain conversations in the presence of CNN's personnel and discussed them in general on air. This may also constitute a waiver. *See, e.g., In re Von Bulow*, 828 F.2d 94 (2d Cir. 1987).

protection of a prior restraint. 427 U.S. at 569. Yet, although the Government took the position that Noriega's calls had been monitored with his consent and the District Court agreed "that's an issue," the court nevertheless took the extraordinary step of restraining CNN, stating "it's kind of beside the major point that we're here about." App. 93a.[22]

d. The Courts Below Also Failed to Consider Alternatives to a Ban on Publication.

Neither the District Court nor the Court of Appeals abided by the standards of *Nebraska Press*, which requires a court to consider whether there exist viable alternatives to the prior restraint. The First Amendment bars any consideration of a prior restraint if measures short of an order restraining publication will adequately protect the defendant's interest in a fair trial. *Nebraska Press*, 427 U.S. at 551-55, 563-64. The failure of the courts below to address the alternatives available is reason enough alone to reverse their decisions.

Any harm to Noriega's ability to obtain a fair trial as a result of disclosure to the prosecution could be prevented by

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[22] The District Court isolated as a second interest Noriega's desire to prevent disclosure of his trial strategy and tactics. App. 21a. Whether or not any harm would come to the defense strategy from telecast of the tapes is entirely speculative: there was no evidence produced to demonstrate any adverse consequences that might occur. Although both the District Court and Eleventh Circuit placed the blame for this dearth of information on CNN, that characterization misses two essential points. First, it was Noriega's burden, not CNN's, to demonstrate the existence of harm, and placing the obligation on CNN to justify publication disregards settled constitutional doctrine. *See, e.g., Southeastern Promotions, Ltd.*, 420 U.S. at 560; *Freedman*, 380 U.S. at 58. Second, the suggestion that CNN has "shackled the District Court" is simply wrong. App. 16a. In fact, it was Noriega who declined to present the explanation of trial-strategy that would make the tapes meaningful, and the District Court agreed that "apparently no one is going to understand what those tapes are about.". App. 81a.

requiring the Government to institute steps to avoid being tainted by any information that is telecast. *See, e.g., United States v. Poindexter*, 698 F. Supp. 300, 312-13 (D.D.C. 1988). This alternative places the burden where it belongs.[23]

To combat the perceived risk of prejudicial publicity tainting the jury pool, the usual and effective measures of a careful jury selection, judicial instruction, continuance, and sequestration are readily at hand.[24] *Nebraska Press*, 427 U.S. at 551-55; *Sheppard v. Maxwell*, 384 U.S. 333, 358-63 (1966). As a result, the District Court was wrong when it stated that it required knowledge of the contents of the tapes in CNN's possession prior to judging the appropriateness of a prior restraint.[25]

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[23] If Noriega's conversations were taped illegally, a branch of the Government — the Bureau of Prisons — appears responsible. If the goal is to keep that illegality from tainting another branch of Government — the prosecutors — the burden should be on the Government, not the member of the news media that uncovered the allegedly illegal activities, to cure it. There was no evidence presented by Noriega or by the Government that such alternatives would not work, only a suggestion that obtaining tapes from CNN would be "more efficient." App. 27a.

[24] Nor was there any showing that alternatives could not be devised to avoid or limit the effects of prejudicial publicity that might arise from CNN's telecast of the Noriega tapes. The District Court itself seemed to recognize this after it opined that "[t]he impartial jury aspect of it has already been dealt with in Nebraska [Press] . . . ." App. 74a. Even so, the court failed to consider the numerous alternatives to prior restraint that are readily available in this case.

[25] Meanwhile, both the District Court and the Court of Appeals suggested that it was "entirely possible that CNN is in possession of communications between Noriega and his lawyers and staff which the Government did not record." App. 27a n.1. There was no basis in the record for these suggestions. They were speculation, hardly sufficient to justify the orders the District Court issued or its refusal to consider such alternative measures as making the Government provide it with the tapes in its possession.

C. The District Court Injunction Further Violates CNN's First Amendment Rights By Its Vagueness.

The District Court injunction was unconstitutionally vague. As this Court stated in *Carroll v. President & Comm'rs of Princess Anne*, 393 U.S. 175, 183 (1968), any restraint on First Amendment freedoms "must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by the constitutional mandate." Thus, government must pursue its goals "by narrowly drawn regulations designed to serve those interests without unnecessarily interfering with First Amendment freedoms." *Village of Schaumburg v. Citizens for Better Environment*, 444 U.S. 620, 637 (1980). "Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone . . . ." *NAACP v. Button*, 371 U.S. 415, 438 (1963).

Such "precision" was absent here. With the District Court formulating an injunction that does not precisely specify the proscribed speech and the Court of Appeals expanding the scope of the prior restraint to potentially reach telecast of tapes not even including attorney-client communications, the rulings below have forced CNN "to defend [its] good faith, at the risk of a contempt citation," as it continues covering this major story. *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 103 n.17 (1981). The proceedings below graphically illustrate the risk to CNN. The District Court recently warned, "I cannot permit a news organ to come before me and say, we have some information that we're going to publish." App. 118a. And, as the Court of Appeals noted, "the restraint . . . could arguably be read to embrace the news report about the recordings as well as the recordings themselves." App. 5a.

II.

THE DECISION BELOW CONFLICTS WITH DECISIONS OF OTHER FEDERAL COURTS OF APPEAL AND OF VARIOUS STATE SUPREME COURTS, WHICH HAVE ADOPTED *NEBRASKA PRESS* STANDARDS IN EVALUATING PRIOR RESTRAINTS

Because the decisions below conflict with this Court's prior restraint cases, it is not surprising to find that they also conflict with the decisions of the other courts of appeal and of various state supreme courts, all of which have properly applied the prior restraint rules stated in *Nebraska Press*. Under Rule 10.1(a), this Court should issue a writ of certiorari to correct the decision below.

A. By Refusing to Apply Prior Restraint Standards, The Court of Appeals' Decision Directly Conflicts With Decisions of Other Circuits.

In *CBS v. United States District Court*, 729 F.2d 1174 (9th Cir. 1983), the Ninth Circuit vacated an order restraining CBS from broadcasting government surveillance tapes generated in the investigation of John DeLorean, noting that since *Nebraska Press* "federal and state appellate courts have held without exception that trial court restraints on the reporting of judicial proceedings failed to meet the requirements set forth in" that case. *Id.* at 1178. While acknowledging the enormous publicity surrounding the DeLorean trial and the possibility that prospective jurors who viewed the investigation tapes might "harbor preconceptions that would threaten Mr. DeLorean's right to trial by an impartial jury," the court found DeLorean's showing too speculative to warrant a prior restraint. *Id.* at 1180. And notwithstanding those circumstances, Mr. DeLorean was acquitted.

Similarly, despite a claimed threat to Fourth Amendment rights, the First Circuit vacated a finding of criminal contempt against the *Providence Journal* for publication of illegally obtained wiretaps about a deceased mobster. *In re Providence Journal Co.*, 820 F.2d 1342 (1st Cir. 1986), *modified*, 820 F.2d 1354 (1st Cir. 1987) (*en banc*), *cert. dismissed*, 485 U.S. 693 (1988). Applying *Nebraska Press*, the court held, among other things, that the Fourth Amendment "could [not] conceivably support the restraint against publication." *Id.* at 1349.[26]

The District Court's Order directing CNN to turn over the tapes at issue also conflicts with the decisions of other courts of appeal. In *Goldblum v. NBC*, 584 F.2d 904 (9th Cir. 1978) (Kennedy, J.), the Ninth Circuit vacated a district court order requiring NBC to produce a copy of a movie based on the

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[26] Other federal appellate decisions, including several within the past year, have also recognized that a prior restraint cannot issue without proof satisfying the *Nebraska Press* standards. *See, e.g., In re Charlotte Observer*, No. 90-5912, slip op., at 6 (4th Cir. Nov. 6, 1990) (unpublished opinion) (vacating oral injunction prohibiting disclosure of name of attorney who had been inadvertently identified as a target of ongoing grand jury investigation: "once announced to the world, the information lost its secret characteristic, an aspect that could not be restored by the issuance of an injunction."); *In re King World Productions, Inc.*, 898 F.2d 56 (6th Cir. 1990) (vacating injunction restraining broadcast of scenes allegedly obtained by illegal surreptitious surveillance); *In re Lifetime Cable*, 17 Media L. Rep. (BNA) 1648 (D.C. Cir.), *cert. denied*, 59 U.S.L.W. 3247 (U.S. 1990) (vacating order restricting broadcast of minor's description of alleged sexual abuse); *Hunt v. NBC*, 872 F.2d 289 (9th Cir. 1989) (rejecting injunction based on claim that a docudrama's portrayal of a murder conviction might prejudice a trial on a second murder); *Rifkin v. Esquire Publishing, Inc.*, 7 Media L. Rep. (BNA) 1231 (9th Cir. 1981) (rejecting claim for "so grave a step" based on protection of individual privacy).

On the other hand, those appellate decisions have been required because a growing number of trial courts apparently have forgotten the rule against prior restraints. The Court should act to ensure this trickle does not become a torrent.

notorious insolvency of the Equity Funding Corporation.[27] The purpose of the production order, which was issued in a suit by a former officer of Equity Funding, "was to determine whether or not to issue an injunction suspending its broadcast." 584 F.2d at 906. The court recognized that the order to produce the film suffered from the same constitutional deficiencies as the request to enjoin the broadcast:

> A broadcaster or publisher should not . . . be required to make a sudden appearance in court and then to take urgent measures to secure appellate relief, all the while weighing the delicate question of whether or not refusal to comply with an apparently invalid order constitutes a contempt.

Id. at 907.

Indeed, the decision of the Court of Appeals in this case departs so far from existing federal precedent that it is also in direct conflict with the case law that was established by its predecessor, the Fifth Circuit.[28] Thus, in *Bernard v. Gulf Oil*

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[27] Similarly, a district court dismissed an order to show cause issued against CBS for a contempt citation when it refused to produce copies of an upcoming episode of "60 Minutes" so that a court could determine whether its broadcast should be enjoined. *In re CBS, Inc.*, 570 F. Supp. 578 (E.D. La. 1983). This case arose out of the criminal prosecution of seven New Orleans police officers whose counsel learned that CBS intended to broadcast a story on the events underlying the charges shortly before the trial was to begin. *See also Telco Communications, Inc. v. Carbaugh*, 885 F.2d 1225 (4th Cir. 1989), *cert. denied*, 110 S. Ct. 1923 (1990) (striking down as prior restraint charitable solicitation statute requiring solicitor to file with state agency copy of script prior to commencement of solicitation).

[28] Furthermore, many of the cases that the Court of Appeals relied upon in upholding the gag order against CNN are by their terms inapplicable to prior restraints. For example, *In re Application of Dow Jones & Co.*, 842 F.2d 603, 609 (2d Cir.), *cert. denied*, 488 U.S. 946 (1988), is cited for the proposition that CNN's First Amendment rights must yield to Sixth Amendment rights. App. 9a. The news agencies in *Dow* appealed an order that restrained extra-judicial

Co., 619 F.2d 459 (5th Cir. 1980) (*en banc*), *aff'd on other grounds*, 452 U.S. 89 (1981), recognizing that "[f]ragile First Amendment rights are often lost or prejudiced by delay," the court ruled that a gag order on communications between class counsel and class members violated the First Amendment. *Id.* at 470. In contrast to the decision of the Court of Appeals, *Bernard* held that neither the "broad management powers" granted by court rules nor the "general authority to regulate the conduct of litigation" can "create an exception to the principles governing prior restraints." *Id.* at 475.[29]

The production order here is no different from those vacated in *Goldblum* and *CBS*. Here, the District Court sought to compel production of source material obtained by CNN in

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speech in a criminal proceeding. The court held that the order, because it was not directed against the press, was not a prior restraint:

> To begin, there is a substantial difference between a restraining order directed against the press — a form of censorship which the First Amendment sought to abolish from these shores — and the order here directed solely against trial participants and challenged only by the press. The distinction is critical. The most offensive aspect of a prior restraint is the censorship involved by forbidding the dissemination of information already known to the press and therefore public.

842 F.2d at 608. Similarly, *Belo Broadcasting Corp. v. Clark*, 654 F.2d 423, 432-433 (5th Cir. 1981) is cited for the proposition that a court must err on the side of protecting a defendant's rights to a fair trial. App. 10a. In *Belo*, broadcasters requested access to audiotape discussion between defendants and FBI agents in connection with the "Brilab" sting operation. The court held that there was no First Amendment right of access to the tapes. Thus, the case did not require the court "to balance 'fair trial' with 'free press' concerns. The 'choice' was rather between an undeniably important but nonconstitutional right of physical access to courtroom exhibits and a defendant's due process right to a fair trial. . . ." *Id.* at 432.

[29] On appeal, this Court affirmed without reaching the First Amendment issues. The Court did note, however, that a proponent of a ban on communications must offer "a particular and specific demonstration of fact." *Gulf Oil Co. v. Bernard*, 452 U.S. at 102 n.16.

the exercise of its First Amendment rights, for the express purpose of determining whether a prior restraint should issue. As the Ninth Circuit explained in *Goldblum*, "[a] procedure thus aimed toward prepublication censorship is an inherent threat to expression, one that chills speech." 584 F.2d at 907. The First Amendment simply does not permit the District Court to act as a censor and review *in advance* an upcoming telecast.

B. The Decision Below is Also Directly Contrary to State Court Precedents, Which Have Properly Applied This Court's Prior Restraint Decisions.

The decision of the Court of Appeals to abandon sixty years of prior restraint jurisprudence also directly conflicts with an unbroken line of decisions of state appellate courts, which have uniformly held that this Court's prior restraint test must be satisfied before a court may issue a ban on communication.[30] These state court decisions reflect a careful analysis of the First Amendment problems posed by prior restraints and a

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[30] *KCST-TV Channel 39 v. Municipal Court*, 201 Cal. App. 3d 143, 246 Cal. Rptr. 869, 870 (1988) (vacated trial court order which restrained publication of lawfully obtained drawings, stating that "[p]rior restraints on media publications, if permissible at all, are permissible only in the most extraordinary circumstances"); *In Interest of M.B.*, 137 Ill. App. 3d 992, 484 N.E.2d 1154, 1159 (1985) (court struck down protective order restraining news media from publishing names of minors charged with certain crimes, holding that the order went beyond what was authorized by statute and constituted an unlawful prior restraint on the newspaper in violation of the First Amendment: "[t]here is a heavy constitutional presumption against prior restraints on the press"); *Hays v. Marano*, 114 A.D.2d 387, 493 N.Y.S.2d 904 (1985) (relying on *Nebraska Press*, the court struck down a prohibition on the publication of grand jury testimony inadvertently placed in public court file); *State ex rel. Chillicothe Gazette, Inc. v. Court of Common Pleas*, 2 Ohio St. 3d 24, 442 N.E.2d 747 (1982) (determining that the trial court did not consider the factors set forth in *Nebraska Press*, the Ohio Supreme Court held that the trial court erred in enjoining a newspaper from publishing names and addresses obtained in open court).

recognition of the heavy burden that the Constitution imposes on the proponents of all such restraints. *See, e.g., State v. Coe*, 101 Wash. 2d 364, 679 P.2d 353, 363 (1984) (trial court not required to balance fair trial right with media's right to publish); *State ex rel. Miami Herald Publishing Co. v. McIntosh*, 340 So.2d 904 (Fla. 1976) (rejecting request for prior restraint against news concerning a criminal trial); *State of Israel v. St. Martin's Press*, 560 N.Y.S.2d 450 (App. Div. 1990) (vacating TRO because "[p]laintiff has failed to overcome the heavy presumption against a prior restraint" and "in view of the distribution of the book . . . , any [prior restraint] would be ineffective").

CONCLUSION

For the foregoing reasons, petitioners request that the Court grant their Petition for Certiorari to review the decision and judgment of the United States Court of Appeals for the Eleventh Circuit.

Dated this 15th day of November, 1990.

Respectfully submitted,

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NO. 90-

IN THE SUPREME COURT
OF THE UNITED STATES OF AMERICA

October Term, 1990

CABLE NEWS NETWORK, INC., and
TURNER BROADCASTING, INC.,

Petitioners,

v.

MANUEL ANTONIO NORIEGA and
UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

CERTIFICATE OF SERVICE

I, P. Cameron DeVore, a member of the Bar of this Court, hereby certify that on this 15th day of November, 1990, three copies of the Petition for Writ of Certiorari in the above-entitled case were personally served upon Frank A. Rubino, Esq., 2601 S. Bayshore Dr., Suite 1400, Coconut Grove, Fla. 33133, counsel for the respondent Noriega herein, and upon Dexter W. Lehtinen, Esq., United States Attorney, and Myles Malman, Esq., Assistant United States Attorney, 155 S. Miami Ave., Miami, Fla. 33130, counsel for the respondent United States of America herein, and upon the Solicitor General,

Department of Justice, Washington, D.C. 20530. I further certify that all parties required to be served have been served.

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90-767

Supreme Court U.S.
FILED
NOV 15 1990
JOSEPH F. SPANIOL, JR.
CLERK

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI AND APPLICATION TO STAY DISTRICT COURT RESTRAINING ORDERS PENDING CERTIORARI

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI AND APPLICATION TO STAY DISTRICT COURT RESTRAINING ORDERS PENDING CERTIORARI

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APPENDIX

No. 90-5927

In the United States Court of Appeals for the Eleventh Circuit

UNITED STATES OF AMERICA,

Plaintiff,

versus

MANUEL ANTONIO NORIEGA

Defendant-Appellee,

CABLE NEWS NETWORK, INC., and
TURNER BROADCASTING SYSTEM, INC.,

Appellants.

Appeal from the United States District Court for the Southern District of Florida

No. 90-5932

IN RE:
CABLE NEWS NETWORK, INC. and
TURNER BROADCASTING SYSTEM, INC.,
Petitioners.

On Petition for Writ of Mandamus or Prohibition to the United States District Court for the Southern District of Florida

(November 10, 1990)

BEFORE: JOHNSON, HATCHETT and BIRCH, Circuit Judges.

PER CURIAM:

This matter is before us on the "emergency motion" of appellants Cable News Network, Inc. and Turner Broadcasting System, Inc. (collectively "CNN") to vacate three orders issued by the United States District Court for the Southern District of Florida (the "District Court"). This case presents a difficult question regarding the District Court's responsibility to balance the Sixth Amendment right to a fair trial of the defendant, General Manuel Antonio Noriega ("Noriega"), with CNN's First Amendment right to be free from prior restraints against the broadcasting of newsworthy information.

I. BACKGROUND

General Noriega is presently incarcerated at the Metropolitan Correctional Center ("MCC") in Dade County, Florida. CNN wishes to broadcast recordings of telephone conversations between Noriega and his defense counsel, which

were allegedly taped by the government while Noriega was in prison and obtained by CNN from an undisclosed source. Case No. 90-5926 is CNN's appeal of an oral order that prohibits it from broadcasting certain tape recordings in its possession until 6:00 p.m. on November 8, 1990. Case No. 90-5927 is CNN's appeal from two written orders of the District Court.[1] Subsequent to the filing of the above-described motions by CNN, it filed an additional petition, denominated "Appellants' Petition for a Writ of Mandamus or Prohibition," in which CNN seeks an order from this Court "directing the District Court below to refrain from hearing a Motion for Contempt filed by Manuel Antonio Noriega" and seeking disqualification of District Court Judge William Hoeveler pursuant to 28 U.S.C. § 455 (No. 90-5932).

At the outset, we note that this Court lacks jurisdiction to hear Case No. 90-5926 because the appeal is from an oral order that has not been entered on the docket of the District Court. *See* Fed. R. App. P. 4(a). Accordingly, that appeal did not divest the District Court of jurisdiction to enter the two written orders that are the subject of Case No. 90-5927. Noriega originally petitioned the District Court for injunctive relief, and CNN has framed its appeal as an "Emergency Motion To Vacate An Unconstitutional Prior Restraint," but the case is not appealable in its present posture.[2] In any event,

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[1] The first written order, dated November 8, 1990, continued the temporary restraint ("TRO") in the oral order until CNN produced the tape recordings in its possession so the District Court could review the contents of those recordings to reach a decision on the merits. The second written order, dated November 9, 1990, clarified the first written order and specified that the restraint would remain in effect for up to ten days, or until such lesser time as the District Court needed to decide the issue on the merits after review of the tape recordings.

[2] *McDougald v. Jenson*, 786 F.2d 1465, 1472 (11th Cir. 1986) ("It is well settled in this circuit that a TRO is not ordinarily

CNN's motion is more properly viewed as a petition for a writ of mandamus against the District Court to correct an abuse of discretion.[3] *See Goldblum v. National Broadcasting Corp.*, 584 F.2d 904, 906 n.2 (9th Cir. 1978). *In re: Capital Cases/ABC, Inc.*, No. 90-7749, slip op. (11th Cir. Nov. 2, 1990). Accordingly, with respect to Case No. 90-5927, we will treat CNN's motion as a petition for mandamus relief.

In his "Memorandum Of Law In Support Of Motion For Injunctive Relief" ("Noriega's Motion"), Noriega sought to prevent CNN from broadcasting the recorded conversations between Noriega and his attorneys. He did *not* seek to enjoin CNN from reporting on the government's taping of the conversations, and argued that "an order directing CNN not to broadcast the tapes is sufficiently narrow [to] protect the interests of the press as well as the defendant."[4] Noriega's

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appealable."). *See Belo Broadcasting Corp. v. Clark*, 654 F.2d 423, 426 (5th Cir. Unit A Aug. 1981).

[3] The Supreme Court has stated that "the writ of mandamus is an extraordinary remedy, to be reserved for extraordinary situations." *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 289, 108 S.Ct. 1133, 1143, 99 L.Ed.2d 296 (1988). Even if exceptional circumstances exist to justify mandamus relief, however, the party seeking mandamus bears the burden of demonstrating a "clear and indisputable" right to issuance of the writ. *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 74 S.Ct. 145, 148, 98 L.Ed.2d 106 (1953).

[4] This court has reviewed the videotape of the proposed news story (a telecast of which was broadcast once on November 7, 1990 prior to entry of the TRO) and notes, as represented in CNN's brief that "[t]he aural content of the tape [of attorney client communications] is not audible in the telecast." We also observe that Noriega's defense counsel, Mr. Frank A. Rubino ("Rubino") cooperated with CNN by reviewing an audio tape of conversation purportedly between Noriega and Ms. Cristina Machin ("Machin") (Rubino's secretary and interpreter) and verified the authenticity of the tape recording. A portion of the interview between a CNN reporter and Rubino (together with Machin) in Rubino's office appears in the telecast. With respect to such conduct we are mindful of the Supreme Court's admonition: "Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only

Motion at 6. Although the restraint imposed by the District Court could arguably be read to embrace the CNN news report about the recordings as well as the recordings themselves, this order will only address the subject matter of Noriega's Motion, the recorded conversations between Noriega and his defense team.[5]

The District Court in entering the TRO, in an effort to maintain the status quo pending a determination on the merits, commented:

> . . . Assuming, however, that there are at least some circumstances in which the First Amendment prohibits the prior restraint of even privileged attorney-client communication, the Supreme Court's pronouncements on the doctrine of prior restraint suggest that a factual inquiry is required. . . . As was stated in the court's Order, the contents of the tape recordings were not before the court. Thus, the court was in effect being asked to make a factual determination without being allowed to review the facts. On this point, it is important to note that CNN is in possession of the tapes, and has resisted turning them over to the court for review. It seems fundamentally unfair to allow CNN to benefit from its refusal to disclose the contents of the tapes to the court — that is, to allow CNN to argue that no prior restraint should issue because no clear and immediate harm is apparent when the only reason that no clear and immediate

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subject to regulation, but is highly censurable and worthy of disciplinary measures." *Shepard v. Maxwell*, 384 U.S. 333, 362-63, 86 S.Ct. 1507, 1522, 16 L.Ed.2d 600 (1966) (cited with approval in *Nebraska Press Assoc. v. Stuart*, 427 U.S. 539, 554, 96 S.Ct. 2791, 2800, 49 L.Ed.2d 683 (1976).

[5] We have been advised that CNN, in disregard and defiance of the District Court's explicit restraining order, broadcast this news report.

harm yet appears is because CNN has so far prevented this court from reviewing the content of the tapes in its possession. In response to the portion of the court's Order requiring production of the tapes to this court for the Magistrate's review, CNN argues that the court should compel production of the tapes from the Government before looking to CNN.[1]

* * *

The court herein wishes to emphasize that its Order was not a decision on the merits of the request for injunction, but rather a temporary restraint until such time as the Magistrate could review the tapes and permit this court to make a determination based on the merits. . . . But the unique nature of the problem facing this court, unlike other courts which have faced this issue, is that no such determination was nor is possible without knowing the precise contents of the speech sought to be restrained, here the privileged attorney-client communications in CNN's possession.

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[1] The court notes that a review of the tapes in the Government's possession would not necessarily allow the court to determine whether or not disclosure of CNN's tapes would inpair Noriega's right to a fair trial. It is entirely possible that CNN is in possession of communications between Noriega and his lawyers and staff which the Government did not record, since it appears that the Government did not tape all of Noriega's attorney-client conversations. The communications in CNN's possession might have been recorded from a location outside of the prison where Noriega is incarcerated.

II. DISCUSSION

A. The District Court's Obligation When Confronted With Allegations Of Prejudicial Publicity.

"[F]ree speech and fair trials are two of the most cherished policies of our civilization, and it would be a trying task to choose between them." *Bridges v. California*, 314 U.S. 252, 260, 62 S. Ct. 190, 192, 86 L.Ed. 192 (1941). Within the context of pretrial and trial proceedings, a district court is often called upon to make this critical and difficult choice.[6] Balancing the First and Sixth Amendment concerns involved in a widely publicized, hence "sensational", criminal case, the former Fifth Circuit concluded that the trial court is accorded broad discretion to accomplish its primary responsibility of ensuring that the accused has a fair trial:

> The right of access to criminal proceedings becomes a highly controversial issue when First Amendment questions must be analyzed in conjunction with competing Sixth Amendment considerations. "A heavy obligation rests on trial judges to effectuate the fair-trial guarantee of the Sixth Amendment." *United States v. Columbia Broadcasting System, Inc.*, 497 F.2d 102, 104 (5th Cir. 1974). "Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, trial courts must take strong measures to ensure that the balance is never weighed against the accused."

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[6] The Supreme Court has recognized a First Amendment right of access to criminal trials, but not to pretrial proceedings. *See Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 104 S. Ct. 819, 78 L.Ed.2d 629 (1984) *(Press-Enterprise I)*; *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 102 S. Ct. 2613, 73 L.Ed.2d 248 (1982); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 100 S. Ct. 2814, 65 L.Ed.2d 973 (1980) (plurality opinion).

Sheppard v. Maxwell, 384 U.S. 333, 362, 86 S. Ct. 1507, 1522, 16 L.Ed.2d 600 (1966). In a widely publicized case, "the right of the accused to trial by an impartial jury can be seriously threatened by the conduct of the news media prior to and during trial." Report of the Committee on the Operation of the Jury System on the "Free Press-Fair Trial" Issue, 45 F.R.D. 391, 394 (1968).

Thus, it is the trial judge's primary responsibility to govern judicial proceedings so as to ensure that the accused receives a fair, orderly trial comporting with fundamental due process. The trial judge is therefore granted broad discretion in ordering the daily activities of his court. *Id.* at 401. "[A] trial judge should have the authority to adopt reasonable measures to avoid injury to the parties by reason of prejudicial or inflammmatory publicity." *Columbia Broadcasting System, Inc. v. Young, supra*, 522 F.2d at 241. See also, *United States v. Schiavo, supra*, 504 F.2d at 6; *United States v. Columbia Broadcasting System, Inc., supra*, 497 F.2d at 106-07. Within this discretion, therefore, the district judge can place restrictions on parties, jurors, lawyers, and others involved with the proceedings despite the fact that such restrictions might affect First Amendment considerations. *Sixth Amendment rights of the accused must be protected always. United States v. Columbia Broadcasting System, Inc., supra; United States v. Schiavo, supra.*

United States v. Gurney, 558 F.2d 1202, 1209-10 (5th Cir. 1977) (emphasis added), *cert. denied*, 435 U.S. 968, 98 S. Ct. 1606, 56 L.Ed.2d 59 (1978); *see Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 570, 96 S. Ct. 2791, 2808, 49 L.Ed.2d 683 (1976) ("This Court has frequently denied that First Amendment rights are absolute and has consistently rejected the proposition that a

prior restraint can never be employed."); *Estes v. Texas*, 381 U.S. 532, 540, 85 S. Ct. 1628, 1632, 14 L.Ed.2d 543 (1965) (The right to a fair trial is so basic to our legal system that it has been called "the most fundamental of all freedoms."); *In re Application of Dow Jones & Co.*, 842 F.2d 603, 609 (2d Cir.), *cert. denied*, 488 U.S. 946, 109 S. Ct. 377, 102 L.Ed.2d 365 (1988) ("When the exercise of free press rights actually tramples upon Sixth Amendment rights, the former must nonetheless yield to the latter.").

Furthermore, the Supreme Court has held that "[t]he First Amendment generally grants the press no right to information about a trial superior to that of the general public." *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 609, 98 S. Ct. 1306, 1318, 55 L.Ed.2d 570 (1978); *Gurney*, 558 F.2d at 1208. Obviously, the general public has no right to private communications between a defendant and his counsel. Utilizing the principle that the press is entitled to no more information than the public together with concern regarding the subsequent fair trial of another defendant, the Fifth Circuit upheld a district court's denial of broadcasting stations' separate requests to broadcast audiotaped discussions between Federal Bureau of Investigation agents and defendants which occurred in a "sting" operation. *Belo Broadcasting Corp. v. Clark*, 654 F.2d 423 (5th Cir. Unit A Aug. 1981).[7] The Fifth Circuit

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[7] In pertinent part, the district court's opinion denying the broadcasting stations' request to broadcast the audiotapes states as follows:

> Widespread publication of these tapes prior to trial will severely prejudice Mr. Moore's [the defendant to be tried later] sixth amendment right to a fair trial, as well as potentially deny him rights guaranteed by the fourth and fifth amendments. Moreover, if the tapes are prematurely heard by the public, this court would be severely hampered in selecting a fair and impartial jury in the forthcoming trial.

Belo Broadcasting Corp., 654 F.2d at 425.

determined that the Constitution did not accord the broadcasting stations the right to play the tapes over the air waves. *Id.* at 427. "It is better to err, if err we must, on the side of generosity in the protection of a defendant's right to a fair trial before an impartial jury." *Id.* at 431.

Notwithstanding the District Court's broad discretion in determining First Amendment interests with respect to a criminal defendant's Sixth Amendment right to a fair trial, a general, conclusory representation that publicity might deprive a defendant's right to a fair trial is insufficient. *See Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 106 S. Ct. 2735, 2744, 92 L.Ed.2d 1 (1986) (*Press-Enterprise II*) ("The First Amendment right of access cannot be overcome by the conclusory assertion that publicity might deprive the defendant of [the right to a fair trial]."); *United States v. Columbia Broadcasting System, Inc.*, 497 F.2d 102, 104 (5th Cir. 1974) ("[B]efore a prior restraint may be imposed by a judge, even in the interest of assuring a fair trial, there must be 'an imminent, not merely a likely, threat to the administration of justice. The danger must not be remote or even probable; it must immediately imperil.' " (quoting *Craig v. Harney*, 331 U.S. 367, 376, 67 S. Ct. 1249, 1255, 91 L.Ed. 1546 (1947))). In the analogous situation of a trial court's closing a pretrial proceeding to protect a defendant's right to a fair trial, the Supreme Court required specific factual findings that: 1) there is a substantial probability that the defendant's right to a fair trial will be prejudiced by the publicity; 2) there is a substantial probability that closure would prevent that prejudice, and 3) reasonable alternatives to closure cannot adequately protect the defendant's fair trial rights. 478 U.S. at 14, 106 S. Ct. at 2743. The purpose of requiring specific findings is to demonstrate that " 'closure is essential to preserve higher values and is narrowly tailored to serve that interest.' " 478 U.S. at , 106 S. Ct. at 2743 (quoting *Press-Enterprise Co. v. Superior*

Court, 464 U.S. 501, 510, 104 S. Ct. 819, 824, 78 L.Ed.2d 629 (1984) (*Press-Enterprise I*); *see Belo Broadcasting Corp.*, 654 F.2d at 430 ("[T]he decision as to access is one best left to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case."); *Columbia Broadcasting System I*, 497 F.2d at 106 (For "a danger [to be] sufficient to warrant a prior restraint, it is basic constitutional law that the limitation can be no broader than necessary to accomplish the desired goal."). In the context of a suppression hearing, the Supreme Court directed the trial court, considering closure because of privacy interests implicated in wiretapped conversations, to determine "whose privacy interests might be infringed, how they would be infringed, what portions of the tapes might infringe them, and what portion of the evidence consisted of the tapes." *Waller v. Georgia*, 467 U.S. 39, 48, 104 S. Ct. 2210, 2216, 81 L.Ed.2d 31 (1984).

The Supreme Court has recognized that prejudicial pretrial publicity can defeat a defendant's right to a fair trial by an impartial jury. *Irvin v. Dowd*, 366 U.S. 717, 81 S. Ct. 1639, 6 L.Ed.2d 751 (1961); *see Patterson v. Colorado*, 205 U.S. 454, 462, 27 S. Ct. 556, 558, 51 L.Ed. 879 (1907) ("[T]he theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print."). The Court has placed an affirmative duty on trial courts to guard against privileged pretrial publicity:

> To safeguard the due process rights of the accused, a trial judge has an affirmative constitutional duty to minimize the effects of prejudicial pretrial publicity. And because of the Constitution's pervasive concern for these due process rights, a trial judge may surely take protective measures even when they are not strictly and inescapably necessary.

Gannett Co. v. DePasquale, 443 U.S. 368, 378, 99 S. Ct. 2898, 2904, 61 L.Ed.2d 608 (1979). Even if the attorney-client communications in this case were determined *not* to be privileged, the district court may decide that the disclosure of these communications may constitute an impediment to Noriega's fair trial.

Under Supreme Court and Eleventh Circuit precedent, the district court's determination of privilege cannot be conclusory, but must be definitively and explicitly stated based on the particular facts and circumstances of this case. *See Gurney*, 558 F.2d at 1211 ("The district court's rulings denying press access implemented a legitimate governmental interest in securing for the accused the fair trial guaranteed by the Sixth Amendment. The court's actions bore a reasonable relation to the achievement of that purpose."). We emphasize that it is essential that the District Court delineate carefully its reasons for proscribing the broadcasting of the tapes in question, guided by the three considerations of *Press-Enterprise II*. Particular attention should be given to the Sixth Amendment concern for an impartial jury. *See Belo Broadcasting Corp.*, 654 F.2d 423 (5th Cir. Unit A Aug. 1981).

The District Court must possess the subject tapes in order to make its *in camera* determination of whether the attorney-client communications are privileged. We are troubled by CNN's refusal to obey the District Court's order to release the tapes in question to the court.[8]

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[8] *United States v. Columbia Broadcasting Sys., Inc.*, 497 F.2d 107, 109 (5th Cir. 1974). The former Fifth Circuit found that the district court held Columbia Broadcasting System, Inc. (CBS) in criminal contempt for telecasting sketches of scenes from a publicized criminal trial in defiance of the court's order, but remanded the case for trial of the contempt action before another judge instead of the trial judge who ordered CBS not to televise the sketches.

With national and international significance and implications, Noriega's trial has received unprecedented media coverage. In light of this status, "[t]he Sixth Amendment's guarantee of an impartial jury . . . is an obligation of the nation, not the accused. It is not his duty to provide an impartial jury." *Levine v. United States District Court*, 764 F.2d 590, 602 (9th Cir. 1985), *cert. denied*, 476 U.S. 1158, 106 S.Ct. 2276, 90 L.Ed.2d 719 (1986). In our nation, the courts are charged with safeguarding a defendant's right to a fair trial and with cautiously balancing First Amendment and Sixth Amendment interests. "It is not asking too much to suggest that those who exercise First Amendment rights in newspapers or broadcasting enterprises direct some effort to protect the rights of an accused to a fair trial by unbiased jurors." *Nebraska Press Ass'n*, 427 U.S. at 560, 96 S.Ct. at 2803.

B. The Existence Of The Attorney-Client Privilege As It Relates To The District Court's Review And Analysis Of Potential Harm To Noriega.

The purpose of the attorney-client privilege is to encourage open and complete communication between a client and his attorney by eliminating the possibility of subsequent compelled disclosure of their confidential communications. *United States v. Suarez*, 820 F.2d 1158, 1160 (11th Cir. 1987). In order to invoke this privilege, the claimant must establish the following:

> (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is [the] member of a bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of

> securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

United States v. Kelly, 569 F.2d 928, 938 (5th Cir. 1978) (quoting *In re Grand Jury Proceedings,* 517 F.2d 686, 670 (5th Cir. 1975).

The attorney-client privilege is not absolute. Because it "serves to obscure the truth, . . . it should be construed as narrowly as is consistent with its purpose." *Suarez,* 820 F.2d at 1160. Thus, this court has developed a two-part analysis to determine when the attorney-client privilege protects a communication between an attorney and his client from government intrusion.[9] A communication between an attorney and his client will be protected if it is: "(1) intended to remain confidential *and* (2) under the circumstances was *reasonably* expected and understood to be confidential." *United States v. Bell,* 776 F.2d 965, 971 (11th Cir. 1985) (emphasis in original) (quoting *United States v. Melvin,* 650 F.2d 641, 645 (5th Cir. Unit B 1981).

In applying the law surrounding the attorney-client privilege to the facts of this case, for the purpose of discussion we will first assume that Noriega did sign a valid release evidencing his understanding that *all* of his telephone conversations, including those with members of his defense team, would be

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[9] Because "a communication between an attorney and his client that is protected by the common law attorney-client privilege is also protected from government intrusion by the sixth amendment," *United States v. Blasco,* 702 F.2d 1315, 1329 (11th Cir. 1983), this discussion of attorney-client privilege encompasses the Sixth Amendment right to effective assistance of counsel.

recorded.[10] Under such circumstances, it is conceivable that the District Court could find that Noriega's attorney-client privilege would not prohibit the government's recording of Noriega's telephone conversations with his defense attorneys because there would not exist a reasonable expectation of privacy. However, this is a matter to be addressed by the District Court. If Noriega did intend his conversations with his defense attorneys to be confidential, after signing a release, the District Court would be required to ascertain whether this expectation was reasonable.

It is a "bedrock principle that the attorney-client privilege is the client's and his alone. If the client wishes to waive it, the attorney may not assert it, either for the client's or his own benefit." *United States v. Juarez*, 573 F.2d 267, 276 (5th Cir.), *cert. denied*, 439 U.S. 915 (1978). Thus, it is also conceivable that the District Court, after examining the telephone usage release signed by Noriega, may determine that Noriega did waive his attorney-client privilege as to the recorded conversations. If this is the case, the privilege may not be assertable. Again, this is a matter for determination by the District Court.

Whether or not the telephonic communications between Noriega and his defense counsel are privileged, while not necessarily determinative of whether such communications should be publically broadcast, would be relevant to the Dis-

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[10] It is not unusual or unreasonable to condition the use of telephones by penal inmates on monitoring of the telephone calls by the authorities charged with the responsibility of maintaining the security of the penal facility. *See, e.g., Feeley v. Sampson*, 570 F.2d 364, 373-374 (1st Cir. 1978) (suggesting that striking an appropriate balance between the interests of prison authorities and prisoners could be achieved by conditioning prisoners' access to telephones on their recognition that prison guards have authority to monitor telephone conversations). Moreover, possession of such communications by one element of the government does not necessarily implicate another element.

trict Court's assessment of potential harm to Noriega's right to a fair trial.

III. CONCLUSION

It is manifest that the District Court has been presented a delicate, difficult and important task requiring him to balance between the press and public's First Amendment rights, the Sixth Amendment rights of the accused, and the public's expectation that the trial will be fair and held before an impartial jury. However, CNN has shackled the District Court by refusing that court's reasonable request to review the audio tapes it has in its possession and which CNN desires to broadcast. While appealing to our nation's judicial system for relief, CNN is at the same time defiant of that system's reasonable directions.

The foregoing analysis compels the conclusion that the First Amendment interests of the press and the public will be best served by immediate production of the tapes held by CNN so that the District Court can conduct the difficult balancing of constitutional rights required under these circumstances; an obligation which the District Court is required to discharge. After review of such tapes, it is entirely conceivable that the District Court may determine that the disclosure of only portions of such tapes would threaten the Sixth Amendment rights of Noriega. Under such circumstances the accused's Sixth Amendment right to a fair trial is properly balanced against the First Amendment rights of the press and public. At this juncture, however, we are required to speculate as a result of CNN's refusal to produce the tape recordings.

No litigant can continue to violate a district court's order and attempt to have that district court's order reviewed at the same time.

Accordingly, for the reasons stated above, we DENY the initial petition for mandamus relief, CNN's request for entry of a stay of the District Court's TRO and its request for oral argument (Case No. 90-5927) and DENY CNN's subsequent petition (Case No. 90-5932).

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 90-5926

UNITED STATES OF AMERICA,

Plaintiff,

versus

MANUEL ANTONIO NORIEGA,

Defendant-Appellee,

CABLE NEWS NETWORK, INC. and
TURNER BROADCASTING SYSTEM, INC.,

Appellants.

On Appeal from the United States District Court for the Southern District of Florida

BEFORE: JOHNSON, HATCHETT and BIRCH, Circuit Judges.

BY THE COURT:

Appellants' appeal from the oral order of November 8, 1990, granting defendant-appellee Noriega's motion for a temporary restraining order prohibiting CNN from telecasting tape recordings in its possession is DISMISSED for lack of jurisdiction. *See* Fed.R.App.P. 4(6).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 88-0079-Cr-Hoeveler

UNITED STATES OF AMERICA,

Plaintiff,

v.

MANUEL NORIEGA, ET AL.,

Defendants.

ORDER

THIS CAUSE IS before the court on Defendant Manuel Noriega's motion to enjoin Cable News Network, Inc. and its corporate parent, Turner Broadcasting System, Inc. (collectively "CNN") from broadcasting or otherwise disseminating contents of tape records containing privileged telephone communications between Noriega and his lawyers and staff.

DISCUSSION

This issue at bar presents the court with the unfortunate and difficult task of resolving a conflict between two fundamental constitutional rights: the sacrosanct First Amendment right of the press to be free from any prior restraint on speech, and the fundamental right of an accused to a fair trial.

At the outset, the court notes that the issue it confronts is unprecedented. The court is aware of no case, and none has been presented to it, in which a member of the press sought to broadcast an otherwise privileged attorney-client communication. Past cases dealing with the conflict between the First Amendment and the right to a fair trial have concerned

damaging information which, if made known, could hamper the selection of a fair and impartial jury. *See Nebraska Press Association v. Stuart*, 427 U.S. 539 (1976); *CBS v. United States District Court*, 729 F.2d 1174 (9th Cir. 1984). Not only does the court now potentially face that very same issue, but it encounters the novel circumstance where the speech, if published, could — against all strictures of due process and fairness — reveal to the prosecution the defendant's trial strategy and protected confidences. The cases cited by the parties discussing the doctrine of prior restraint are, therefore, of somewhat limited precedential value to the facts of this case.

Defendant characterizes the issue as the violation of the attorney-client privilege. To be sure, there is no question that such a violation has occurred. CNN concedes that the tapes contain communication between Noriega and his lawyers or staff, and there is no indication that the attorney-client privilege was waived. It further appears that the conversations were recorded by a third-party, and that the tapes of these conversations were delivered into CNN's possession either by that same party or another third-party. Nonetheless, it is the court's opinion that the issue at stake is more properly framed as the defendant's right to a fair trial.

The attorney-client privilege is not per se a constitutional right; however, the privilege takes on a constitutional aspect when, as here, it serves to protect a criminal defendant's Sixth Amendment right to effective assistance of counsel by ensuring unimpeded communication and disclosure by the defendant to his attorney. That purpose, however, has already been frustrated by the very fact of invasion. An injunction prohibiting CNN from broadcasting the tapes would go nowhere toward preventing the harm which has already occurred — that harm being Noriega's understandable reluctance to freely discuss his case with his lawyers in light of what has occurred. In other words, the uninhibited communication which the attorney-

client privilege protects was impeded at the very moment Noriega learned his confidential conversations were being monitored, and given this, a restraint on the broadcast of those conversations would be symbolic and prophylactic as far as this aspect of the attorney-client privilege is concerned.

A secondary purpose behind the attorney-client privilege, and the prohibition of its violation, is to prevent the disclosure of information damaging to the defendant's case — information which, though damaging, is privileged. In this sense, the issue is really one of the right to a fair trial rather than the attorney-client privilege per se. The court therefore sees this case as a conflict between Noriega's right to a fair trial and the First Amendment prohibition against prior restraints.

The right of the press to be free of prior restraints on speech is, of course, at the very core of the First Amendment. A prior restraint is presumptively unconstitutional, with the movant bearing the "heavy burden of showing justification for the imposition of such a restraint." *Organization for a Better Austin v. Keefe,* 402 U.S. 415, 419 (1971). "In its nearly two centuries of existence, the Supreme Court has never upheld a prior restraint on speech." *In re Providence Journal Co.,* 820 F.2d 1342, 1348 (1st Cir. 1986), *modified,* 820 F.2d 1354 (1st Cir. 1987) (en banc), *cert. dismissed,* 485 U.S. 693 (1988). This does not mean, however, that there is no situation in which a prior restraint on the press is justified. Among the very narrow range of cases which may justify a restraint are those involving a criminal defendant's right to a fair trial. *Nebraska Press Association v. Stuart,* 427 U.S. 539 (1976); *In re Providence Journal Co.,* 820 F.2d at 1350. *Nebraska Press Association* involved the problem of excessive pretrial publicity and the right to a fair and impartial jury. In that case, the Supreme Court established the test that must be met before prior

restraint is justified where the restraint is based on the need to prevent such prejudicial publicity:

> 1) the nature and the extent of pretrial publicity must impair the right to a fair trial;
>
> 2) there exist no less restrictive alternative measures which would mitigate the effects of the publicity; and
>
> 3) a prior restraint would effectively prevent the harm.

Nebraska Press Association, 427 U.S. at 562-68.

The Supreme Court struck down the restraints in *Nebraska Press Association* on the ground that alternative means existed to ensure a fair jury — for example, change of venue, careful voir dire, and a postponement of the trial.

In this case, however, another distinct aspect of the right to a fair trial is at issue, and that is the right of the defendant not to have his trial strategy and tactics disclosed to the prosecution. The court recognizes, as stated earlier, that the movant bears a heavy burden to prove that a prior restraint is justified, and that a prior restraint can issue only where the danger of disclosure is clear, immediate, and irreparable. On this point, defense counsel has already heard certain portions of CNN's tapes, and has stated to the court that the portions he heard involved discussion of witnesses, defense investigations, evidence, and trial strategy at the core of Noriega's defense. It is further noted that defense counsel's burden on the issue is significantly hampered by the fact that his ability to fully elaborate upon the nature of the harm is limited given the presence of CNN, the prosecution, and indeed, the undersigned, at the hearing. Full disclosure of the extent of the harm — which would involve discussion of his defense and trial strategy — would bring about the very problem he seeks to avoid.

As is set forth in the cases, and in particular, *Nebraska Press Association*, the determination of when prior restraint is justified where it conflicts with the right of fair trial must rest upon factual findings based on the contents of the speech at issue. The three-prong test in *Nebraska Press Association*, addressed to prejudicial pretrial publicity, applies here as well where the disclosure of the defense and confidential trial strategy is at stake. Thus, the court would have to determine, based upon the content of the speech, whether the nature and extent of the disclosure would impair the right to a fair trial, whether any less drastic means exists which would mitigate the effects of the disclosure, and whether a prior restraint would effectively prevent the harm. Unfortunately, the contents of CNN's tapes are not before the court, and therefore it is impossible to determine, at this stage, the precise extent to which Noriega's right to a fair trial would be hampered by disclosure. What is known at this point is that at least some of the tapes contain discussions of witnesses, evidence, and certain other aspects of Noriega's defense. Perhaps this alone is enough to sustain an interim injunction during the course of the trial. But given the heavy constitutional presumption against prior restraints, it is the court's opinion that further inquiry is required. Accordingly, it is hereby

ORDERED and ADJUDGED that the temporary injunction imposed on CNN at the hearing this morning is continued until such time as the court can review the contents of the tape recordings in CNN's possession. In order to avert a situation which would require recusal of the undersigned on the basis of exposure to privileged attorney client communications, review of the tapes at issue will be undertaken by the Honorable William C. Turnoff, who will thereupon determine whether anything contained in the recordings presents a clear, immediate, and irreparable danger to defendant's right to a fair trial. In order to accomplish this necessary task CNN will be re-

quired to produce copies of the tapes currently in its possession.

DONE and ORDERED in chambers in Miami, Florida this 8th day of November 1990.

UNITED STATES DISTRICT JUDGE

Copies furnished to
Counsel of Record.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 88-0079-Cr-Hoeveler

UNITED STATES OF AMERICA,

Plaintiff,

v.

MANUEL NORIEGA, et al.,

Defendants.

SUPPLEMENTAL ORDER

THIS CAUSE IS before the court upon the Motion of Defendant Manuel Noriega for an injunction restraining CNN from broadcasting the contents of tape recordings containing privileged attorney-client communications.

At 8:30 a.m. on November 8, 1990, the court convened an emergency hearing on defendant's motion. At the conclusion of the hearing, the court ordered CNN to refrain from broadcasting the tapes until it heard from the court later in the day so as to provide the court with time to deliberate on the novel issues raised by the motion. The court subsequently entered an Order continuing its temporary restraint until such time as a federal magistrate could review the contents of the tape recordings and determine whether defendant Noriega's right to a fair trial would be jeopardized by publication of the contents of the attorney-client communications. The court's temporary restraining order and Order continuing the temporary restraint did not and do not apply to conversations which do not contain privileged attorney-client communications.

In light of CNN's emergency appeal of the court's Order to the Eleventh Circuit Court of Appeals, the court enters this Supplemental Order to further clarify and elaborate on the court's decision.

The initial question presented by the case is whether the press can constitutionally be prohibited from publishing privileged attorney-client communications which have not been waived, regardless of how the communications were obtained by the press and regardless of the particular content of the attorney-client communications. Assuming, however, that there are at least some circumstances in which the First Amendment prohibits the prior restraint of even privileged attorney-client communication, the Supreme Court's pronouncements on the doctrine of prior restraint suggest that a factual inquiry is required. In *Nebraska Press Association v. Stuart,* the Supreme Court established that the test for determining whether a prior restraint can issue where the right to a fair trial is at stake requires conclusions as to 1) whether the right to a fair trial would be impaired, 2) whether less restrictive alternative measures short of prior restraint are sufficient, and 3) whether a prior restraint would effectively prevent the harm. 427 U.S. 539, 562-68 (1976). As was stated in the court's Order, the contents of the tape recordings were not before the court. Thus, the court was in effect being asked to make a factual determination without being allowed to review the facts. On this point, it is important to note that CNN is in possession of the tapes, and has resisted turning them over to the court for review. It seems fundamentally unfair to allow CNN to benefit from its refusal to disclose the contents of the tapes to the court — that is, to allow CNN to argue that no prior restraint should issue because no clear and immediate harm is apparent when the only reason that no clear and immediate harm yet appears is because CNN has so far prevented this court from reviewing the content of the tapes in its possession. In re-

sponse to the portion of the court's Order requiring production of the tapes to this court for the Magistrate's review, CNN argues that the court should compel production of the tapes from the Government before looking to CNN.[1] Requiring Governmental production would require the Magistrate to review all of the recorded phone calls between Noriega and his attorneys — potentially hundreds of them dating back to January 1990 — in search of damaging attorney-client communications. The more efficient alternative would be for CNN to provide the specific conversations in its possession for expedited review. Obviously, CNN prefers delay to production, indicating that this court's temporary restraint is not viewed even by CNN as a serious infringement of its First Amendment rights.

The court herein wishes to emphasize that its Order was not a decision on the merits of the request for injunction, but rather a temporary restraint until such time as the Magistrate could review the tapes and permit this court to make a determination based on the merits. Of course, usually a decision to impose a temporary restraint on speech can be viewed as a decision on the merits of the request, since even a temporary restraint can issue only after the court is convinced that disclosure would clearly and immediately harm the particular right at stake. *Nebraska Press Association*, 427 U.S. 559 ("the burden on the [party seeking the restraint] is not reduced by the temporary nature of the restraint"); *CBS v.*

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[1] The court notes that a review of the tapes in the Government's possession would not necessarily allow the court to determine whether or not disclosure of CNN's tapes would impair Noriega's right to a fair trial. It is entirely possible that CNN is in possession of communications between Noriega and his lawyers and staff which the Government did not record, since it appears that the Government did not tape all of Noriega's attorney-client conversations. The communications in CNN's possession might have been recorded from a location outside of the prison where Noriega is incarcerated.

United States District Court, 729 F.2d 1174, 1177 (9th Cir. 1983). But the unique nature of the problem facing this court, unlike other courts which have faced this issue, is that no such determination was nor is possible without knowing the precise contents of the speech sought to be restrained, here the privileged attorney-client communications in CNN's possession. *See e.g., New York Times Co. v. United States*, 403 U.S. 713 (1971); *Nebraska Press Association*, 427 U.S. 539 (1976); *CBS v. United States District Court*, 729 F.2d 1174 (9th Cir. 1983); *In re Providence Journal Co.* 820 F.2d 1342 (1st Cir. 1986), *modified*, 820 F.2d 1354 (1st Cir. 1987) (en banc), *cert. dismissed* 485 U.S. 693 (1988).

CONCLUSION

I cannot conceive that the law of prior restraint is so sacrosanct and so encompassing that there can be no fact situation which would justify enjoining publication of communications between attorney and client regardless of the nature of the communications or the method by which the information was obtained. If the invasion or the propagation of the invasion is not, as stated, in and of itself legally sufficient to justify enjoining, certainly it would appear necessary to look to the surrounding facts to determine the nature and extent of potential damage before dissemination.

We are here concerned with one of the most fundamental protections afforded an accused. Before final determination on the merits where such a vital constitutional right is at stake, it is only fundamentally fair that both the court and the parties explore both the facts and the law surrounding the issues. Accordingly it is hereby

ORDERED and ADJUDGED that the court's Order of November 8, 1990 on this matter is hereby supplemented; it is further ORDERED and ADJUDGED that the temporary re-

straining order will remain in effect for up to ten (10) days or such lesser time as needed by this court to review the recorded communications and reach a decision on the merits.

DONE and ORDERED in chambers in Miami, Florida this 9th day of November 1990.

WILLIAM H. HOEVELER
UNITED STATES DISTRICT
JUDGE

Copies furnished to
Counsel of Record.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO: 88-79-CR-HOEVELER

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GENERAL MANUEL A. NORIEGA,

Defendant.

COMES NOW the Defendant, GENERAL MANUEL ANTONIO NORIEGA, by and through his undersigned attorney and hereby files this, his Motion For Injunction.

On Tuesday evening, November 6, 1990, Mr. John Camp, Marlene Fernandez and Kathy Slobugin of CNN, Turner Broadcasting Systems, Inc., came to this attorney's office. They advised that they were in possession of seven (7) tape recordings made by the Department of Justice at the Miami Metropolitan Correctional Center. They further advised that these tape recordings were recordings of telephone conversations made by General Noriega. They played a portion of one (1) tape recording for me; it was clearly a tape recording of an attorney/client privileged communication between General Noriega, Cristina Machin, of my office, interpreting, and my legal assistant, James Hawkins. This conversation involved trial strategy and investigation of the pending criminal charges against General Noriega.

Both this attorney and Cristina Machin listened to the tape recording, and have no doubt, whatsoever, that this was an attorney/client privileged communication that should never have been recorded by anyone whatsoever, let alone to be

released on national television. Communications between a lawyer and a client are sacred and this most horrendous constitutional violation by the government, should not be allowed to continue to the point of public broadcast. CNN advised that they intend to air a show about the wiretapping of General Noriega's telephone, by the Justice Department, on Thursday evening, November 8th, 1990 at 6:00 p.m.

It is not the intention of the Defendant, General Manuel Antonio Noriega, to prohibit freedom of press, or deny CNN their First Amendment rights. Conversely, it is not General Noriega's intent, nor this attorney's intent to waive the attorney/client privilege established between them.

More specifically, the objection made is not to CNN's right to broadcast a story, but specifically their right to play a particular attorney/client privileged communication. No objection is made, whatsoever, to CNN's airing of any news story, whatsoever, and more particularly no objection is made to this particular news story, but only to the playing of a constitutionally protected communication between an attorney and his client.

WHEREFORE it is most respectfully requested that this Honorable Court will grant this emergency injunction prohibiting CNN, Turner Broadcasting Systems, Inc., from broadcasting any tape recording of any communication between General Manuel Antonio Noriega and any of his lawyers or his staff.

Respectfully submitted,

FRANK A. RUBINO, ESQUIRE
2601 So. Bayshore Drive
Suite 1400
Coconut Grove, FL 33133
(305) 858-5300
Fla. Bar No: 209171

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion For Injunction was faxed to Myles Malman, Assistant United States Attorney, 155 South Miami Avenue, Miami, Florida 33130, and CNN, Turner Broadcasting Systems, Inc., Miami, Florida and Atlanta, Georgia, this the 7th day of November, 1990.

_____

FRANK A. RUBINO, ESQUIRE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 88-79-Cr-Hoeveler

NOTICE OF HEARING
EMERGENCY INJUNCTION

UNITED STATES OF AMERICA,

Plaintiff,

v.

GENERAL MANUEL NORIEGA,

Defendant.

Please take Notice that the Honorable William Hoeveler will hold a hearing on General Manuel Antonio Noriega's Motion for Injunction, to prohibit CNN, Turner Broadcasting Network from broadcasting tape recordings of confidential attorney-client privileged telephone conversations which have been illegally recorded by the United States Justice Department.

This hearing shall take place at the United States District Court for the Southern District of Florida, 301 N. Miami

Avenue, 9th Floor, Miami, Florida on Thursday November 8, 1990 at 8:30 a.m.

Respectfully submitted,

FRANK A. RUBINO, ESQUIRE
Attorney for the Defendant.
2601 S. Bayshore Drive
Suite 1400
Coconut Grove, FL 33133
(305) 858-5300
Fla. Bar No. 209171

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Notice of Hearing was faxed to CNN, Miami, Florida and Atlanta, Georgia this the 7th day of November 1990.

FRANK A. RUBINO, ESQUIRE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NUMBER: 88-79-CR-HOEVELER

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GENERAL MANUEL A. NORIEGA,

Defendant.

NOTICE OF APPEAL

Turner Broadcasting Systems and Cable News Network, Inc. hereby appeals to the United States Court of Appeals for the Eleventh Circuit from this Court's oral Order granting a Temporary Restraining Order entered in this action on November 8, 1990.

Respectfully submitted,

Daniel M. Waggoner
Stuart F. Pierson
DAVIS WRIGHT TREMAINE
1752 N Street N.W., Suite 800
Washington, D.C. 20036

Steven W. Korn
Vice President and General Counsel
Turner Broadcasting System, Inc.
One CNN Center
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Attorneys for Turner Broadcasting System, Inc. and Cable News Network

and

Terry Bienstock
Frates Bienstock & Sheehe
Suite 3160
Southeast Financial Center
200 South Biscayne Blvd.
Miami, Florida 33131

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Notice of Appeal was served by hand this 8th day of November, 1990 on MYLES MALMAN, Assistant United States Attorney, 155 South Miami Avenue, Miami, Florida 33130 and FRANK A. RUBINO, 1400 General Development Center, 2600 South Bayshore Drive, Coconut Grove, Florida 33133.

_____

ATTORNEY

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

APPEAL NO.

UNITED STATES OF AMERICA,

Plaintiff,

v.

GENERAL MANUEL A. NORIEGA,

Defendant;

CABLE NEWS NETWORK, INC., et al,

Emergency Appellants.

CNN NOTICE OF APPEAL

Under the Federal Rules of Appellate Procedure, the rules of this Court and particularly this Court's Rule 27-1(b), Cable News Network, Inc., and its corporate parent, Turner Broadcasting System, Inc., (collectively "CNN"), herewith appeal from an order entered November 8, 1990 by the United States District Court for the Southern District of Florida, prohibiting CNN from telecasting news information until that court decides whether to extend its prior restraint further in time.

CNN proceeds on this appeal as an affected party subject to the District Court's order, and it seeks emergency, expedited treatment in this Court to review immediately and to vacate forthwith that order as a violation of the First Amendment to the United States Constitution.

Respectfully submitted this 8th day of November, 1990.

Dan M. Waggoner

Stuart F. Pierson
Davis Wright Tremaine
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Washington, D.C. 20036

Steven W. Korn
Ga. Bar No. 428500
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UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

APPEAL NO. ~

UNITED STATES OF AMERICA,

Plaintiff,

v.

GENERAL MANUEL A. NORIEGA,

Defendant;

CABLE NEWS NETWORK, INC., et al,

Emergency Appellants.

EMERGENCY MOTION OF APPELLANT CNN

Cable News Network, Inc., and its corporate parent, Turner Broadcasting System, Inc., (collectively "CNN"), herewith make an emergency motion to this Court for immediate consideration and vacation of an order entered November 8, 1990 by the United States District Court for the Southern District of Florida in the case of the United States v. Noriega, USDC No. 88-79-CR-HOEVELER. As grounds for this motion, CNN states:

1. CNN provides worldwide, 24-hour news and information by telecast.

2. As it now stands, the District Court has ordered that CNN is prohibited from telecasting tape recordings in its possession, the content of which has been publicly identified by Noriega's counsel as confidential conversations with his defense team concerning strategy and investigation of his defense. Noriega's counsel has asserted

that the government has made the tape recordings in violation of his attorney-client privilege.

3. The District Court's order was entered upon the motion of defendant Noriega to restrain CNN from telecasting clearly newsworthy information concerning the government's conduct in that criminal case.

4. Under the First Amendment to the United States Constitution, any motion for prior restraint of a news report faces a very heavy burden and a heavy presumption against its constitutional validity.

5. That heavy burden was not met by any of the parties or the court below.

6. Therefore, the order was an unconstitutional prior restraint which should be immediately considered and vacated by this Court.

7. Upon the foregoing, and as more fully set forth in the attached Memorandum and Support, there is a high likelihood that appellant will prevail on the merits; irreparable injury has already occurred and will continue if relief is not provided forthwith; any alleged harm to other parties cannot outweigh the constitutional rights at stake; and the public interest will be served by immediately eliminating this infringement on constitutionally protected rights.

This motion is based on all materials of record in the District Court, on the attached Memorandum in Support, and on all other papers attached hereto.

WHEREFORE, CNN prays for this Court's immediate consideration and forthwith order vacating the order appealed from and all similar orders.

Respectfully submitted this 8th day of November, 1990.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA,

Plaintiff,

v.

GENERAL MANUEL A. NORIEGA,

Defendant.

CASE NUMBER: 88-79-CR-HOEVELER

TURNER BROADCASTING SYSTEM, INC. AND CABLE NEWS NETWORK, INC.'S MOTION FOR STAY PENDING APPEAL AND INCORPORATED MEMORANDUM OF LAW

Turner Broadcasting System, Inc. and Cable News Network (collectively ("CNN") prays for the entry of a stay pending emergency appeal of its preliminary injunction prohibiting CNN from broadcasting any portion of the tapes it has obtained containing conversations between Manuel Noriega and his attorneys. This Motion is made pursuant to Rule 62(c) of the Federal Rules of Civil Procedure. In support of his Motion, CNN shows the Court as follows:

1. Rule 62(c) of the Federal Rules of Civil Procedure provides as follows:

> **(c) Injunction Pending Appeal.** When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal. . . .

This Court should, in its discretion, stay the operation of its preliminary injunction for the reasons set forth below.

2. This Court's Order is a prior restraint on the Press and is presumptively unconstitutional. *Pittsburgh Press Company v. Pittsburgh Committee on Human Relations*, 413 U.S. 376 (1973); *Nebraska Press Association v. Stuart*, 427 U.S. 539 (1976). Continuation of this Order in effect during the appellate process will cause irreparable injury to CNN by denying it the freedom of the press guaranteed by the first Amendment to the United States Constitution.

WHEREFORE, CNN prays for a stay of this Court's Order dated November 8, 1990, pending emergency appeal of this action.

Respectfully submitted,

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and

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Telephone: (305) 358-7447

By: TERRY S. BIENSTOCK
Florida Bar Number 259160

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Motion for Stay Pending Appeal and Incorporated Memorandum of Law was served by hand this 8th day of November, 1990 on MYLES MALMAN, Assistant United States Attorney, 155 South Miami Avenue, Miami, Florida 33130 and FRANK A. RUBINO, 1400 General Development Center, 2600 South Bayshore Drive, Coconut Grove, Florida 33133.

_____

ATTORNEY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NUMBER: 88-79-CR-HOEVELER

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GENERAL MANUEL A. NORIEGA,

Defendant.

NOTICE OF APPEAL

Turner Broadcasting Systems and Cable News Network, Inc. hereby appeals to the United States Court of Appeals for the Eleventh Circuit from this Court's written Order granting a Temporary Restraining Order entered in this action on November 8, 1990, and from the Supplemental Order modifying same entered on November 9, 1990.

Respectfully submitted,

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By: TERRY S. BIENSTOCK
Florida Bar Number 259160

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Notice of Appeal was served by hand this 9th day of November, 1990 on MYLES MALMAN, Assistant United States Attorney, 155 South Miami Avenue, Miami, Florida 33130 and FRANK A. RUBINO, 1400 General Development Center, 2600 South Bayshore Drive, Coconut Grove, Florida 33133.

ATTORNEY

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

APPEAL NO.

UNITED STATES OF AMERICA,

Plaintiff,

v.

GENERAL MANUEL A. NORIEGA,

Defendant;

CABLE NEWS NETWORK, INC., et. al,

Emergency Appellants.

SECOND EMERGENCY MOTION OF APPELLANT CNN

Cable News Network, Inc., and its corporate parent, Turner Broadcasting System, Inc., (collectively "CNN"), herewith make an emergency motion to this Court for immediate consideration and vacation of a second order entered November 8, 1990 by the United States District Court for the Southern District of Florida in the case of the *United States v. Noriega*, USDC No. 88-79-CR-HOEVELER. This emergency motion relates to an order issued by the District Court during the evening of November 8, 1990 and a supplemental order issued on November 9, 1990. The issuance of such order occurred subsequent to CNN's filing of an emergency motion concerning a previous order entered by the District Court on the morning of November 8, 1990. As grounds for this motion, CNN states:

1. CNN provides worldwide, 24-hour news and information by telecast.

2. As it now stands, the District Court has ordered that CNN is prohibited from telecasting tape recordings

in its possession, the content of which has been publicly identified by Noriega's counsel as confidential conversations with his defense team concerning strategy and investigation of his defense. Noriega's counsel has asserted that the government has made the tape recordings in violation of his attorney-client privilege.

3. The District Court's order was entered upon the motion of defendant Noriega to restrain CNN from telecasting clearly newsworthy information concerning the government's conduct in that criminal case.

4. Under the First Amendment to the United States Constitution, any motion for prior restraint of a news report faces a very heavy burden and a heavy presumption against its constitutional validity.

5. That heavy burden was not met by any of the parties or the court below.

6. Therefore, the order was an unconstitutional prior restraint which should be immediately considered and vacated by this Court.

7. Upon the foregoing, and as more fully set forth in the attached Memorandum and Support, there is a high likelihood that appellant will prevail on the merits; irreparable injury has already occurred and will continue if relief is not provided forthwith; any alleged harm to other parties cannot outweigh the constitutional rights at stake; and the public interest will be served by immediately eliminating this infringement on constitutionally protected rights.

This motion is based on all materials of record in the District Court, on the attached Memorandum in Support, and on all other papers attached hereto.

WHEREFORE, CNN prays for this Court's immediate consideration and forthwith order vacating the order appealed from and all similar orders.

Respectfully submitted this 8th day of November, 1990.

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UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

APPEAL NO.

UNITED STATES OF AMERICA,

Plaintiff,

v.

GENERAL MANUEL A. NORIEGA,

Defendant,

CABLE NEWS NETWORK, INC., et al,

Emergency Appellants.

CNN'S MOTION FOR A STAY PENDING APPEAL

Pursuant to Federal Rule of Civil Procedure 8(a), Cable News Network, Inc., and its corporate parent Turner Broadcasting System, Inc. (collectively "CNN") hereby respectfully request a stay of an order issued November 8, 1990 by the United States District Court for the Southern District of Florida in the case of *United States v. America v. Manuel A. Noriega*, District Court No. 88-79-CR-HOEVELER.

STATEMENT

The United States District Court for the Southern District of Florida, Judge Hoeveler presiding, in a series of orders has enjoined CNN temporarily from telecasting certain audio recordings obtained by CNN. The recordings allegedly contain conversations between Defendant Noriega and his defense team.

The District Court's orders, by their terms, remain in effect until such time as the District Court issues a further

final ruling on a motion by Noriega's defense attorney that CNN be enjoined permanently from telecasting such recordings. A further ruling will not issue, however, until the Court below gathers further information about the content of all tapes potentially at issue in CNN's story, a process that may last for an extended period. At this time, the District Court only has ordered the U.S. Bureau of Prisons ("B.O.P.") to identify the number of tapes to Magistrate William Turnoff, apparently for his possible, eventual review. While the B.O.P. has indicated that it will attempt to state the number of tapes by Friday, November 9, 1990, it is entirely possible that the B.O.P.'s identification, and possible eventual review and production will take much longer. In any event, CNN is entitled to a stay of the District Court's order pending appeal, due to the nature of the issues at stake.

To be entitled to a stay of the District Court's order, CNN must establish (i) a reasonable probability of success on the merits, (ii) a substantial threat that it will suffer irreparable injury if the injunction is not granted, (iii) that the threatened injury outweighs the threatened harm any injunction or restraining order may cause the opposing party; and (iv) that the entry of injunctive relief will not disserve the public interest. *See, e.g.* FRCP 8; *Callaway v. Block*, 763 F.2d 1283, 1287 (11th Cir. 1985). Because: (i) the District Court's order is unconstitutional; (ii) CNN has been and will continue to be irreparably injured as a result of the effects of such order; (iii) minimal harm to Noriega will result from a stay of the order; and (iv) the public interest will be served by a stay of the order, CNN's motion for a stay of the order should be granted.

A request for a stay of the order giving rise to this motion has been made both orally and in writing to and denied by the District Court which issued the order.

CITATION OF AUTHORITY

All applicable authority demonstrates that this Court should grant CNN's motion for a stay of the District Court's order, pending appeal.

1. *CNN has a probability of success on the merits.*

The merits of CNN's case are set forth in full in CNN's Memorandum In Support Of Its Emergency Motion, previously served on the Court on November 8, 1990. The United States Supreme Court and Courts of Appeal have uniformly rejected prior restraints against news telecasts as unconstitutional, a principle recognized but erroneously ignored by the District Court. (See, *e.g., Near v. Minnesota*, 283 U.S. 697 (1931); *New York Times Co. v. United States*, 403 U.S. 713 (1971); *Pittsburgh Press Co. v. Pittburgh Comm. on Human Relations*, 413 U.S. 376 (1973)). Because such restraints are presumptively unconstitutional and because the District Court's order is transparently invalid under the First Amendment, CNN has demonstrated a clear probability of success on the merits.

2. *CNN will suffer irreparable injury if this Court does not stay the lower Court's order.*

A transparently invalid order prohibiting CNN from exercising its rights under the First Amendment is *per se* evidence of irreparable damage. *See Nebraska Press Assoc. v. Stuart*, 472 U.S. 539, 565-566 (1976); *In re Providence Journal Co.*, 820 F.2d 1342 (1st Cir. 1986), *modified* 820 F.2d 1354 (1st Cir. 1987) (*en banc*), *cert. dismissed* 485 U.S. 693 (1988) *In Re C.B.S., Inc.* 570 F.Supp. 578, 585 ("[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."). By virtue of the Court's order, CNN has been restrained and is being restrained from disseminating compelling and newsworthy information pertaining to its discovery of tape recordings of conversations between

Noriega and his attorneys. CNN will continue to be irreparably damaged absent this Court's consideration and vacation of the lower Court's order.

3. *No undue harm will result to Noriega as a result of this Court's issuance of a stay pending appeal.*

Any damage to Noriega's case arising as a result of tape recordings containing conversations between Noriega and his defense team has already occurred or can be addressed through the less intrusive alternative of restraining the prosecution team from examining any such conversations. The harm to Noriega (and, concurrent therewith, the potential violation of his attorney-client privilege) occurred by virtue of the creation, existence and possible review by the government of the tape recordings themselves — not CNN's potential telecast thereof. The District Court's order prohibiting CNN from further publicizing the contents of the tape is moot, because the information it seeks to restrain already has been widely publicized, including by Noriega's own counsel. Accordingly, Noriega will not be harmed if this Court stays the lower Court's order.

4. *The public interest will be served by this Court's grant of CNN's application for a stay pending appeal.*

"[T]he protection against prior restraint should have particular force as applied to reporting of criminal proceedings, whether the crime in question is a single isolated act or a pattern of criminal conduct." *Nebraska Press*, 427 U.S. 539, 557-559 (1976). Here, CNN is fulfilling its primary role under the First Amendment to report on criminal proceedings and government action. The public interest will be served by this Court's issuance of a stay of the District Court's order pending appeal, protecting CNN's constitutional rights under the First Amendment and the public interest in receipt of news.

CONCLUSION

For the reasons and upon the authorities cited above, CNN respectfully requests that its notice for a stay pending appeal be granted. CNN further requests that the bond for the stay be set at $0, due to the nature of the interests as stake and the fact that no dollar value can be placed upon same.

Respectfully submitted this eighth day of November 1990.

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UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

APPEAL NO.

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Defendant;

CABLE NEWS NETWORK, INC., et al,

Emergency Appellants.

APPELLANT CNN'S APPLICATION FOR LEAVE TO PRESENT A VIDEOCASSETTE TAPE AT ORAL ARGUMENT ON ITS EMERGENCY MOTION IN THE ABOVE-CAPTIONED MATTER

Cable News Network, Inc., and its corporate parent Turner Broadcasting System, Inc. (collectively "CNN") have moved this Court to consider on an emergency basis CNN's request that this Court consider and vacate an order entered November 8 and 9, 1990, by the United States District Court for the Southern District of Florida in the case of United States v. Noriega, USDC No. 88-79-CR-HOEVELER, and issue writs of mandamus and prohibition restraining the District Court from conducting a hearing at 3:00 p.m. on November 10, 1990.

At 6:30 p.m. on November 9, 1990, CNN telecast a story on the Noriega tapes, and shortly thereafter, the Honorable William Hoeveler made certain statements to an employee for

CNN concerning the earlier telecast and these proceedings. Those statements may well have bearing on CNN's applications to this Court.

Therefore, CNN respectfully requests that it be granted leave to file and exhibit the videocassette tape to the Court.

DATED this 10th day of November, 1990.

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UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

APPEAL NO.

UNITED STATES OF AMERICA,

Plaintiff,

v.

GENERAL MANUEL A. NORIEGA,

Defendant;

CABLE NEWS NETWORK, INC., et al,

Emergency Appellants.

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the attached notice of appeal and emergency motion on counsel for the United States and defendant by telefax, this 10th day of November, 1990.

Daniel M. Waggoner

NORIEGA TAPES

NOVEMBER 8, 1990

THE UNITED STATES GOVERNMENT HAS BEEN CLANDESTINELY TAPING ITS PRIME PRISONER GENERAL MANUEL NORIEGA. CNN SPECIAL ASSIGNMENTS JOHN CAMP HAS THE STORY.

Montage of Noriega with supporters, intercut with invasion, ending with Noriega capture

CAMP VO

December 1989, the U-S invades Panama to capture General Manuel Antonio Noriega. He is portrayed as a narcoterrorist, a man who plundered his own country and made millions in the transportation of cocaine into the United States. In January he is brought to the U-S to stand trial on drug conspiracy charges.

BUSH SOT

WE ARE COMMITTED TO A FAIR TRIAL AND TO PROVIDING ALL THE PROTECTIONS GUARANTEED BY THE U-S CONSTITUTION AND LAWS.

CAMP OC

BUT CNN HAS OBTAINED MATERIAL INCLUDING TAPE RECORDINGS THAT RAISE SERIOUS QUESTIONS ABOUT PROCEDURES IN THE CASE AND MAY EVEN RAISE A QUESTION ABOUT WHETHER GENERAL NORIEGA WILL RECEIVE A FAIR TRIAL.

ACCORDING TO INFORMATION RECEIVED BY CNN THE TAPES ARE IN THE POSSESSION OF THE FEDERAL GOVERNMENT.

Prison Exterior

CAMP VO

Today, General Noriega is held under tight security in the Miami correctional center.

His main link with the outside world, the telephone.

AUDIO
FROM PRISON GUARD

This previously recorded outgoing telephone call was placed from the correctional center in Miami, Florida on March 16th, 1990 by inmate Manuel Antonio Noriega, serial number 38699079.

CAMP VO

As a matter of course federal prisoners like Noriega are asked to sign waivers allowing their conversations to be monitored or tape recorded by prison officials.

CNN TELEMUNDO correspondent Marlene Fernandes has obtained excerpts of tapes said to contain those conversations.

Noriega talks about reorganizing his power base in Panama as in this conversation with a former Panamanian official in hiding at the time.

AUDIO

FROM NORIEGA TAPES: Tape 1, 5:31:00

Hi Lucho.

Hi boss. How are you? I was worried because I didn't hear from you for so long.

I thought you had already gone out of the country.

No, your friends have me trapped here.

: But you are working hard, right?

: Enormously.

: Uhmm, because it is important to keep the morale of our people high.

STILL of Bush with Noriega

CAMP VO

Sometimes General Noriega appears to conceal the content of his discussions as in this message to the Cuban embassy in Panama about George Bush.

Noriega in prison

AUDIO

FROM NORIEGA TAPES:
Tape 2, 5:39:28

CAMP VO

According to CNN's information Noriega appears to be using a crude code to say: We are going to return the ball to the court of the CIA and Bush in our legal strategy.

In other tapes Noriega talks about transferring sums of money, political moves in Panama and concerns about prospective witnesses against him.

CAMP VO

Although the government may be authorized to tape conversations of a federal prisoner, there are certain conversations that generally are unlawful to record — those with the prisoner's attorney.

GILLERS SOT

THE AREA THAT IS INVIOLATE IS THE COMMUNICATIONS BETWEEN THE DEFENDANT AND HIS OR HER LAWYER OR ANY MEMBER OF THE DEFENSE TEAM.

CAMP VO

New York University professor Stephen Gillers is an expert in legal ethics.

GILLERS SOT

A PERSON IN JAIL AWAITING TRIAL HAS A RIGHT TO CONSULT WITH COUNSEL AND REPRESENTATIVES, AND THAT CONSULTATION HAS TO BE TOTALLY SECRET.

Tape 1, second bite

CAMP VO

But CNN has a tape which appears to be excerpts of a conversation between Noriega and his defense team. CNN has also been shown evidence that there are other such recordings.

SONNETT SOT

I AM OUTRAGED THAT THE GOVERNMENT WOULD RECORD THOSE KINDS OF CONVERSATIONS.

CAMP VO

Neal Sonnett is past president of the National Association of Criminal Defense Lawyers and a former Noriega attorney.

SONNETT SOT

I THINK IT'S CLEAR GOVERNMENT MISCONDUCT. IT FLIES IN THE FACE OF EVERYTHING THAT'S SACRED ABOUT THE ATTORNEY-CLIENT PRIVILEGE. AND THE ATTORNEY-CLIENT RELATIONSHIP.

GILLERS SOT

IF IT'S BEEN GOING ON FOR A LONG PERIOD OF TIME SO THAT INADVERTANT OR ACCIDENT IS NO LONGER A REASONABLE INFERENCE, IF THE GOVERNMENT SAT DOWN AND SAID, HEY . . . WHAT A FIND. LET'S TAPE THIS GUY'S CONVERSATIONS WITH HIS LAWYERS. IT WILL GIVE US A BETTER CHANCE TO WIN IN COURT, IF THAT'S WHAT THE GOVERNMENT DID THEN IT RISKS LOSING THE CASE. IT RISKS HAVING THE INDICTMENT DISMISSED FOR PROSECUTORIAL MISCONDUCT.

TAPE 1, BITE 4

Justice department exterior

CAMP VO

CNN has made repeated efforts to get a response from the Department of Justice about the tapes, both in Miami and in Washington but it has refused to comment.

Someone who would comment is Richard Gregorie, a former assistant U-S attorney who spearheaded the investigation of Noriega that lead to his indictment.

CAMP SOT

CAN YOU IMAGINE ANY CIRCUMSTANCES UNDER WHICH THERE WOULD BE RECORDINGS OF WHAT COULD PERHAPS BE CLASSIFIED AS ATTORNEY-CLIENT PRIVILEGE?

Tape 4, 1:59

GREGORIE SOT

THIS CASE CERTAINLY WAS A LARGE PART OF MY LIFE FOR A COUPLE OF YEARS AND SOMETHING I FEEL VERY STRONGLY ABOUT. I WOULD BE VERY CONCERNED ABOUT ENDANGERING THE CASE BY RECORDING CONVERSATIONS THAT MIGHT INVOLVE NORIEGA'S LAWYER.

Tape 4, 2:14

HOWEVER, IF THE JUSTICE DEPARTMENT HAD REASON TO BELIEVE THERE WAS ANOTHER CRIME BEING COMMITTED, THAT IS NORIEGA WAS PLANNING SOME OTHER CRIMINAL ACT WHILE HE WAS IN JAIL, THEN THEY WOULD HAVE AUTHORITY TO INVESTIGATE THAT ONGOING CRIMINAL ACT.

Tape 4, 2:43

Justice Department exterior

CAMP VO

In extraordinary circumstances the law permits recording conversations between a defendant and his attorney. But with no comment from the justice department CNN has been unable to determine whether the conversations were legally recorded.

RUBINO SOT

I CANNOT IN MY WILDEST DREAMS BELIEVE THERE IS A PENDING INVESTIGATION GOING ON RIGHT NOW THAT ANY JUDGE WOULD JUSTIFY JEOPARDIZING THIS PROSECUTION IN ORDER TO SIGN THAT WIRE TAP. IT'S JUST BEYOND THE REALMS OF REALITY.

Tape 7, bite 3

CAMP VO

Frank Rubino is Noriega's attorney.

Until CNN came to him, he said he had no knowledge that conversations between his office staff and Noriega had been recorded.

Rubino and listening to tape

NAT SOUND RUBINO TO CRISTINA

(Rubino) IS THERE ANY QUESTION THAT'S YOUR VOICE??

(Cristina) NO . . . THAT'S MY VOICE.

CAMP SOT

WHAT'S YOUR REACTION?

RUBINO SOT

ABSOLUTE SHOCK. I AM ABSOLUTELY HORRIFIED, THAT THE U-S GOVERNMENT WOULD STOOP THIS LOW TO VIOLATE GENERAL NORIEGA'S CONSTITUTIONAL RIGHT TO COMMUNICATE WITH AN ATTORNEY.

Tape 7, bite 1

CAMP SOT

WHAT'S YOUR UNDERSTANDING OF THE RECORDING OF GENERAL NORIEGA'S CONVERSATIONS?

RUBINO SOT

IT'S BLATANTLY OBVIOUS WHAT THIS IS, THIS IS A RECORDING OF GENERAL NORIEGA CALLING HIS ATTORNEY'S OFFICE. SPEAKING TO ONE OF THE MEMBERS ON THE DEFENSE TEAM, CRISTINA, THE SECRETARY. WHO ACTS AS AN INTERPRETOR, SEEKING LEGAL ADVISE, ASKING US TO DO CERTAIN LEGAL THINGS IN HIS CASE.

THE GOVERNMENT HAS RECORDED THIS AND THEY HAVE DONE IT. AND IT'S THE MOST GRAVE VIOLATION OF HIS CONSTITUTIONAL RIGHTS, I HAVE EVER SEEN.

Tape 7, bite 2

CAMP SOT

ACCIDENT?

RUBINO SOT

OBVIOUSLY NOT . . . YOU DON'T ACCIDENTLY RECORD A CONVERSATION. YOU CAN ACCIDENTLY RECORD THE FIRST TEN SECONDS OR TWENTY SECONDS UNTIL YOU REALIZE OH MY GOODNESS HE'S TALKING TO HIS LAWYER, AND QUICKLY SHUTS IT OFF. YOU DON'T ACCIDENTLY RECORD AN ENTIRE TAPE.

Tape 7, bite 5 or 6

CAMP OC

IF IN FACT THE GOVERNMENT IMPROPERLY RECORDED OR MISUSED THE CONVERSATIONS OF GENERAL NORIEGA AND HIS ATTORNEYS IT COULD DERAIL WHAT HAS BEEN DESCRIBED AS THE MOST IMPORTANT FEDERAL PROSECUTION IN YEARS.

BUT THERE IS MORE AT STAKE THAN THE PROSECUTION OF NORIEGA.

HIS CAPTURE AND PROSECUTION WERE USED AS A JUSTIFICATION FOR INVADING PANAMA.

LOSING THE CASE WOULD BE A MAJOR SETBACK FOR THE DEPARTMENT OF JUSTICE AND THE BUSH ADMINISTRATION.

SO THE QUESTION IS NOT ONLY WH) RECORDED THE CONVERSATIONS, BUT WHO LISTENED.

Noriega and his supporters

GILLERS OC AND VO

IF THIS HAPPENED, AND IF THE FEDERAL GOVERNMENT HAS REALLY BEEN LISTENING TO MANY TAPES OF CONVERSATIONS BETWEEN NORIEGA AND COUNSEL AND PLANNING ITS CASE BASED ON THOSE TAPES THEN THERE'S A VERY GOOD CHANCE, AN EXCELLENT CHANCE THAT THE JUDGE WILL DISMISS THE INDICTMENT AND IT WILL NOT BE ABLE TO BE BROUGHT AGAIN. THAT WOULD BE THE END OF THE CASE.

Tape 3

I'm John Camp . . . C-N-N Special Assignment.

TAG: THIS MORNING NORIEGA'S ATTORNEY IS GOING TO COURT IN AN EFFORT TO BLOCK THE USE OF THE TAPES IN OUR BROADCAST. IN HIS MOTION HE STATED, "BOTH THIS ATTORNEY AND CRISTINA MACHIN LISTENED TO THE TAPE RECORDING, AND HAVE NO DOUBT, WHATSOEVER, THAT THIS WAS AN ATTORNEY/CLIENT PRIVILEGE COMMUNICATION THAT SHOULD NEVER HAVE BEEN RECORDED BY ANYONE WHATSOEVER, LET ALONE TO BE RELEASED ON NATIONAL TELEVISION."

Noriega 11/8/90 6:40 AM

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF FLORIDA

CASE NO. 88-79-CR

Miami, Florida
November 8 & 9, 1990

8:45 o'clock, a.m.

UNITED STATES OF AMERICA

vs.

GENERAL MANUEL A. NORIEGA,

Defendant.

TRANSCRIPT OF HEARING
BEFORE THE HONORABLE WILLIAM M. HOEVELER,
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For The Government:	Myles Malman, Esq. -and- Guy Lewis, Esq. 155 South Miami Avenue Miami, Florida 33130
For The Defendant:	Frank A. Rubino, Esq. 2601 South Bayshore Drive Coconut Grove, Florida 33133 -and- Jon May, Esq. 155 South Miami Avenue Miami, Florida 33130
For CNN:	Terry S. Bienstock, Esq. 200 South Biscayne Boulevard Miami, Florida 33131 -and- Daniel M. Waggoner, Esq. 1501 Fourth Avenue Seattle, Washington 98101
Court Reporter:	Roger W. Watford Official Court Reporter 301 North Miami Avenue Miami, Florida 33128

(Tr. 4)

administrator and investigator, on the tape. General Noriega had called our office and was discussing with us certain witnesses in the case and certain forms of investigation. There is absolutely, unequivocably no doubt in my mind that that conversation was clearly an attorney/client protected conversation. When I heard this tape I was actually in shock. I was in total shock to believe that the United States government would be wiretapping conversations between lawyers and their clients. I guess, to be very candid with the court, my main argument, my main problem, is far more with the government than with CNN, but we'll address that at a later time under appropriate motions.

Here today we're asking this Court for an injunction against CNN. Our purpose is, very simply stated, we do not mean in any way, shape or form to interfere with the First Amendment rights of CNN or any other broadcast network or any other media form. What we ask, and to draw this as narrowly as possible, we ask this Court to prohibit CNN from playing on national television or any other form of broadcast any attorney/client privileged tape that they may be in the possession of. Any other forms of communication that they have received that are not of an attorney/client nature, obviously, we strenuously object to the government recording those and we more strenuously object to the

(Tr. 12)

prosecutors and their agents from turning on Cable News Network tonight. So we have a very serious threat to our ability to defend General Noriega as well as to select an impartial jury.

THE COURT: The impartial jury aspect of it has already been dealt with in Nebraska, for example.

MR. MAY: No, Your Honor. In Nebraska what they said is that one of the inquiries that this Court must make is whether or not, number one, a change of venue would assure an impartial jury, while it may be in a high publicity murder case in Nebraska you can take a change of venue to Iowa, but I can assure this Court that what CNN broadcasts is going to be broadcast to every village and city and community in this country, there's not going to be a place that you can change venue. As an alternative, the Supreme Court in Nebraska said there is the possibility of postponing the trial. Even if that is something that this Court would be inclined to do, CNN, if CNN is capable of broadcasting this tonight, whatever tapes CNN possesses now, whatever tapes CNN gets on the eve of trial, can also be broadcast, Your Honor, so postponement of trial, as an alternative suggested in Nebraska Press, is not a reasonable alternative.

And I submit the other alternative suggested that this Court consider in terms of voir dire to the jury as

(Tr. 16)

on that request, Your Honor. This matter has, not only has the FBI been asked to investigate it, but it's been asked at the highest levels, and we intend to fully and aggressively pursue the matter of how these tapes got out. That is item number one.

THE COURT: Fine.

MR. MALMAN: As a footnote to that statement, Your Honor, the trial team, myself, Mr. Sullivan and Mr. Lewis, will not participate in that investigation so that we are free and clear of any possible overflow or overspill of information that may be revealed to that extent. In addition, Your Honor, we kind of make any argument before this Court this morning in a bit of blindfolded alley. I mean we're blindfolded in an alley, so to speak. We have not heard any of these tapes that are the subject of today's court hearing. We have not seen any of these tapes which are the subject of today's court hearing. So therefore, we don't know what they contain. And I guess that is on the one hand not good because we have a lack of knowledge but on the other hand it is good as the trial team itself, and I can put this to rest right now, the trial team has not listened to, heard or been privy to any of these tapes that involve conversations between attorney and client.

THE COURT: Well, knowing you and the others on the trial team, I certainly am willing to accept that.

(Tr. 17)

MR. MALMAN: Not only that, Your Honor, but the trial team and the case agents have been instructed and advised not to hear, read, listen to, be exposed to any dissemination of any tapes or conversations between attorney and client. I want to give the Court, add that caveat to my argument today also. If I can proceed Your Honor, I would reserve on the issue of this First Amendment question until we have heard from CNN, but I wanted to address to the Court initially what our position was on the release, the unauthorized release and possession of materials which they, obviously, at some point had absolutely no right and may have committed violations of federal law in possessing, but that matter is being fully and aggressively and intensively investigated and that investigation will not cease until it's concluded one way or the other. I just wanted to again say that, Judge.

THE COURT: All right, thank you.

MR. MALMAN: All right. May I reserve my other comments to —

THE COURT: You may. Let me ask you, though, one or two questions because I have talked to the warden this morning. I understand you may have the associate warden with you.

MR. MALMAN: We do, sir.

THE COURT: I would like to clear up one or two

(Tr. 18)

facts. It's my understanding that all conversations, telephone conversations, are monitored and tape recorded unless there is a request for there to be a confidential conversation. Would you check and — is that correct?

MR. MALMAN: I have the information, all the information for the Court. Do you want it now or do you want me to —

THE COURT: Why don't we get it now as a predicate for further argument?

MR. MALMAN: Very well, Your Honor. When all conversations of all inmates at the MCC pursuant to BOP policy, all conversations are monitored, when an inmate enters the institution —

THE COURT: Does that mean they are recorded as well?

MR. MALMAN: Yes, sir.

THE COURT: All right.

MR. MALMAN: That's correct. The associate warden nods his head affirmatively.

THE COURT: Are they advised of that?

MR. MALMAN: Yes. And I can tell you exactly how they are advised of that. When an inmate enters the institution he's given a handbook in either English or Spanish for which he signs a receipt. Within that handbook the inmate is told that his conversations, all

(Tr. 19)

conversations, telephone calls, are recorded and monitored. If he wishes to have a private call between himself and counsel, he is to notify the prison authorities and arrangements are made. When an inmate tells the prison authorities that he wishes to speak to his or her attorney privately and not have the conversation monitored, those wishes are complied with by the Bureau of Prisons. In addition to this notification, there are policies on file in the prison library that are available to the inmates which explain in detail the Bureau of Prisons policy on this. In addition, there are signs all over the institution notifying the inmate that his or her calls are monitored. In addition, each and every inmate is given, in this particular case in Spanish, a waiver or a notification, an acknowledgment, if you will, Judge, that his telephone calls are monitored and that the inmate acknowledges receipt of that information and the inmate is told this, that this is done for the safety and security of the Bureau of Prisons, etcetera. And I have with me today, Your Honor, and I could hand up to the Court a copy of the acknowledgment, in this case in Spanish, signed by the defendant Noriega.

THE COURT: Could I see that?

MR. MALMAN: Yes. And I would like to mark it Exhibit 1 for purposes of today's hearing.

(Tr. 31)

do that absent an order of Court under Title 3 of the appropriate statute.

MR. RUBINO: Well, the next request I would have is to ask this Court to appoint an independent commission to investigate not only this incident but to investigate to what extent, if any, illegal wiretapping may have occurred or eavesdropping or surveillance on the lawyers, on their offices, on their home telephones, on their car telephones, in their vehicles, and to determine what, if any, extent surveillance or monitoring or bugging or wiretapping may have compromised this case and may have compromised our clearly constitutionally protected conversations with our client and our clearly constitutionally protected communications among ourselves. I ask the Court now to investigate this so I don't have to come back here in maybe a week or two or six and say look what I have now, Judge, here's the tape of my home telephone, here's the tape of John May sitting in my library with the door locked discussing the case. I think this is the tip of the iceberg. We don't know how far this has gone.

And I say to this Court this is not, though they may want to believe it, your garden variety drug case. This is a political case. This is involving a world leader who was, prior to his being the leader of the country, headed up the intelligence agency for that government for many, many

(Tr. 32)

years. This case involves the CIA, the NSA, and we all know their capabilities and I think they must be looked into. And I most respectfully request this Court to appoint some independent commission to see if this case has been compromised, maybe not particularly from the U.S. Attorney's Office so far, but from the CIA, the NSA, those people who would delve into General Noriega, into things he knows, into things he may be telling us. Your Honor, that is my request for today.

THE COURT: All right, sir, thank you.

MR. MALMAN: May I briefly respond, Your Honor?

THE COURT: All right.

MR. MALMAN: As to any request to seal, impound tapes, etcetera, I think what we're here to deal with today is Mr. Rubino's request to this Court for an injunction, any of those requests, they should be in writing, the government should have an opportunity to fully and completely brief them and respond to them. But let me say this, Judge, that there has been a lot of wild and unfettered speculation here today and accusations. What we're dealing with here, Judge, is an issue not of wiretapping but of monitoring of phone calls by the Bureau of Prisons where the person who is the subject of those phone monitorings has been notified, has acknowledged it. The defendant Noriega is the one that generated those conversations, is the one that generated the

(Tr. 66)

MR. RUBINO: Your Honor, I think we're on pretty clear ground that the tape in question is an attorney/client privilege tape. If we are not, I am prepared to call witnesses on that issue to make it more than abundantly clear that it is. And I ask the Court's posture.

THE COURT: I am coming to the conclusion, as we speak, that in order to satisfy the second prong of the preliminary injunction elements, I probably ought to hear whatever CNN has.

MR. RUBINO: May I address that right on the spot?

THE COURT: Yes.

MR. RUBINO: In order to do that, you are also going to have to do two other things. One of them is, if you are going to listen to the tape, you need to put it in context. Therefore, you are going to have to have me tell you my entire defense strategy. You are going to have to have me tell you how that tape fits within the broad category of defending General Noriega. You are going to have to have me tell you the relevance. And that, most respectfully, I refuse to do.

THE COURT: Well, I don't blame you for that, but if you need to do that then apparently no one is going to understand what those tapes are about.

MR. RUBINO: But I understand. I'm the only one in this courtroom or in this world, save the other lawyers

(Tr. 68)

want to get rid of you, but if you are going to make me do it, please don't. I think then we're going to have to go to another judge.

Let me get down to some of the issues and let's talk about what issues are at stake. Somehow CNN has moved the Court over to the area that we're talking about the degree of harm by the release. Well, the degree of harm is that there is an attorney/client privilege that has been violated. The Constitution of the United States has been violated. You can't compound that now and you can't decide, well, we're now, you know, what you really do, I tell you what you do, you would be saying, okay, there are exceptions to the attorney/client privilege, and I'm carving out a new exception, and a new exception is called the degree of harm exception. If within the secret confines of attorney/client privilege conversation there is no harm to the client it's okay to disclose that communication. That's what you do. You create an exception.

THE COURT: Not really. What CNN is saying is this: They had no part directly in creating the violation, which was done by someone that has been suggested is connected with the government. They came in to possession of the material but did not create the opportunity. They simply enjoyed the opportunity and got the tapes. Now they say that has been done and they're not concerned about

(Tr. 80)

THE COURT: Well, how many tapes do you have?

MR. WAGGONER: I don't know, Your Honor, exactly, but I am just trying to —

THE COURT: What do you mean when you say all tapes?

MR. WAGGONER: I am saying that we have already discussed the fact that there are a number of tapes and I simply am trying to understand the Court's ruling.

THE COURT: Then it would apply to any tapes that disclose the attorney/client information. If there are other tapes that don't have anything to do with the attorney/client situation I don't think they are before the Court. And you can do what you want to with them.

MR. WAGGONER: That's fine, Your Honor. I just wanted clarification on that point. Just so you know, Your Honor, I am simply not in a position to make any commitment.

THE COURT: I understand. I don't fault you for that.

MR. WAGGONER: Thank you, Your Honor.

MR. RUBINO: In all the due respect to the Court, are you leaving it up to CNN to decide what is attorney/client privilege and what is not?

THE COURT: Well, I don't know that I have any choice under the circumstances except to ask the government to tell me if they have reviewed it, and the government says

(Tr. 81)

they haven't reviewed it.

MR. RUBINO: Because I have only heard a portion of one tape. May I ask you to modify your order and restrict them from revealing the contents of any tape that involved General Noriega and his lawyers or their associates?

THE COURT: Well, in so far as the conversations are between General Noriega and the lawyers and their associates, that seems to me to come within the attorney/client privilege situation.

MR. RUBINO: I believe so too.

THE COURT: Yes. Other tapes I make no ruling on.

MR. RUBINO: We don't have a problem with that. Thank you, Your Honor.

THE COURT: All right. Is there anything else from the government at the moment?

MR. MALMAN: No, Your Honor.

THE COURT: Now, I am still in a quandry about the tapes, and I understand that an investigation has been started, and will be pressed as vigorously as possible.

MR. MALMAN: Yes, sir, with utmost vigor.

THE COURT: Yes. Do you know, not you, or does the bureau know the tapes that we're talking about, what has been disclosed and what hasn't been?

MR. MALMAN: We have no knowledge of what CNN has.

(Tr. 82)

No tapes have been played for us as has been played for Mr. Rubino. We do know when the taping began, when the taping ended, I'm sorry, the parameters of the taping, and the associated ways in which the tapes were kept. Those will be the subject, and to whom they were disseminated, if anyone, those would be the subject of the investigation and we will take appropriate steps, despite what Mr. Rubino said, to insure, number one, that the trial team is kept away from any such information, albeit internally or externally as disseminated and, number two, to look into every single avenue and possibility as to how these tapes may have been released.

THE COURT: All right. Now, one other thing I would like to do is to, is for the government, or the Bureau of Prisons to determine how many tapes there are in which he and his lawyers have been in conversation to find some way to secure those tapes beyond that which has already taken place. And while I can't really, I don't think I have the authority to order the Bureau of Prisons to do things which affect their internal security, I would like to ask, and then I will contemplate an order if this request is refused, but I would hear you further on that, I would like to ask that any further conversations between the attorneys, their representatives and General Noriega not be monitored. Is that a request that can be complied with?

(Tr. 83)

MR. STONE: Yes, Your Honor.

THE COURT: All right. Then I will make that request, that no further conversations between the lawyers, their representatives and the defendant be monitored. Any others, of course, for security purposes you would have the right to do that. As far as the request for an independent commission to investigate, I don't think that's necessary, at least at this time. The FBI is entirely competent to conduct such an investigation, and I will deny that request. I will take under consideration until later today the motion for an injunction. And I think with that, counsel, we have completed the hearing. And I thank you very much.

MR. RUBINO: Thank you, Your Honor.

(Hearing recessed at 11:10 o'clock, a.m., and reconvened at 5:55 o'clock, p.m., as follows:)

THE COURT: In as much as it's now five minutes of 6:00 and that the object of our affections, CNN, may want to know what to do, I am entering a restraining order at least until tomorrow. I will explain why in a moment. But I think they ought to know that if those tapes are aired it will be in violation of the Court's order. I hope that's taken care of the problem.

MR. BIENSTOCK: We notified them, Your Honor.

THE COURT: Yes, thank you. Now, I am preparing an order. It's not quite finished, it's in the last stages,

(Tr. 92)

will resist and will appeal the Court's ruling and, in fact, first let me state, ask the Court to stay the order pending review by the 11th Circuit.

THE COURT: I will stay the order as far as the production of the tapes is concerned. I will not stay the order as far as the continuing injunction is concerned until tomorrow.

MR. BIENSTOCK: And I would ask that, if I could file a notice of appeal from the continuation of the injunction. I have it here.

THE COURT: You may. And I might say that, and this is a non-legal comment, I would be glad to desist from this procedure if CNN considers this further and elects to act in a way or in a manner which I think comports with the desire of all involved in this case to assure that the defendant is able to have a fair trial. This is a non-legal request.

MR. BIENSTOCK: I understand, Your Honor.

THE COURT: One that can be, of course, ignored by CNN. But it's a question of responsibility and ethical reporting and the consideration of the problems that a court has in insuring any defendant but in particular this defendant, whom the world watches and our system is being watched also, to make, to make sure that a fair trial is granted not just by the Court, by the parties involved, by

(Tr. 94)

MR. BIENSTOCK: Respectfully, Your Honor, though, the First Amendment dictates that that alternative be exercised first.

THE COURT: Well, here's the problem. I don't know how many calls have been taped, and if there are 20 or 30 I have no idea which ones CNN has.

MR. BIENSTOCK: If they are all innocuous, respectfully, until the magistrate hears all the tapes and makes that determination, it is inappropriate then to inquire of the Court further.

THE COURT: I agree with you. I want to do whatever is right under the circumstances. Is the government able to produce these for me?

MR. MALMAN: Judge, we have no idea what CNN has.

THE COURT: I know that.

MR. MALMAN: We have absolutely no idea. So therefore we have no idea what to produce for the Court. That is the problem.

MR. BIENSTOCK: Judge, they have to have —

MR. MALMAN: Excuse me, counsel.

THE COURT: I can't resist the comment that somebody down there has an idea.

MR. MALMAN: It's collective thinking, Your Honor. We can produce a global mass of tapes to the Court, but that would really be, we don't know which ones they are referring

to. We have not listened to them.

THE COURT: I understand that. And I know you are not going to. And I am confident that you will, your team will do what you suggest it will.

MR. MALMAN: We will, Your Honor.

THE COURT: I would like this, though. I would like you to have somebody from MCC go through that reel, find out how many tapes there are of conversations between the defendant and anyone involved with the office of the lawyer, give me an idea, if you would tomorrow morning, as to the number of taped telephone conversations there are, specifically limited to that inquiry; that is, telephone conversations between the defendant and any one of his legal team. You think — can you do that for me?

MR. MALMAN: We will endeavor to do that as quickly as possible, Your Honor.

THE COURT: And then if there are 20 or 10 or so we can have them reproduced and I could have them up here by sometime tomorrow. If there are 150 that presents us with a different problem. So if you could get me that initial information by sometime early tomorrow morning I would greatly appreciate it.

MR. MALMAN: Judge, let's assume we did that and we produced to the Court X amount of conversations and the Court listened or the Court had the magistrate listen to X

(Tr. 96)

amount of conversations. There is, and the magistrate found them either innocuous, harmful, whatever, and the magistrate reported to the Court that conversations A through D are innocuous or they are harmful, and then the Court would then make its ruling according to that. That would have no comparison to what the being of the tapes in question are that are the result of this hearing today. In other words, the magistrate could find conversations A through D perfect and then the Court could say there is no harm, CNN, go ahead and then I'm just trying to bring to the Court a mechanical problem that I perceive, we, as we have stated our position, which is none in effect, but I, what I am saying to the Court is that if we do that, Judge, that is not the end of the problem.

THE COURT: You're right. You make a valid point, Mr. Malman. But I think I've got to take this one step at a time. I don't want you to get involved with these tapes yourself. But while I'm not looking to CNN's source, I am looking to what they have. I think we have a right to know that because there is a motion for an injunction and it's very hard to work on something like that, given that I have moved past the concept point that we discussed this morning into the facts, it is very hard for me to rule on a motion for an injunction without knowing what the facts are.

MR. BIENSTOCK: Judge, once you get the

(Tr. 97)

information from the government, through the magistrate, then the determination can be made on necessity, and there may be other alternatives for the Court to rule on that production.

THE COURT: Well, in the meantime, do me this courtesy, inquire as to where they are and have them ready just in case. Because I'm going to want to see them from some source, indeed I am going to order them from some source, and if we have got to get into a contempt type proceeding we will, of course. I don't want to have to do that unless it's absolutely necessary.

MR. BIENSTOCK: May I ask the Court at this point is there, concerning the procedural method which I think the Court is engaging in that's appropriate by having gone to the government first, I would ask the Court to vacate the portion of the order requiring CNN to produce the tapes at this time, so that need not be the subject of the appeal.

THE COURT: Sandra points out something to me that none of us have discussed, and that, it's a fair point, and that is in all this talk we have had we really don't, we really are not certain that these tapes were produced from MCC, are we?

MR. RUBINO: Your tapes.

MR. BIENSTOCK: I can — I don't know what was broadcast concerning that issue, if it's public information,

(Tr. 100)

THE COURT: All right, fair enough. That at least disposes of that.

MR. RUBINO: We know it's a conversation at MCC. Was it recorded at MCC?

THE COURT: Well, Mr. Bienstock was good enough to make that representation. We're going to proceed as I have indicated. Is there any other comment that anyone would like to make?

MR. RUBINO: If I may.

THE COURT: Yes, sir. Did you have anything further, Mr. Bienstock?

MR. BIENSTOCK: Judge, I would ask for a vacation of the order as to production of the tapes at this time pending the government producing them.

THE COURT: I will vacate that part of it until sometime tomorrow.

MR. BIENSTOCK: Thank you, Your Honor.

MR. MALMAN: Just along those lines, counsel brought up a point before, and that is, without us, the United States, getting into the fray that's happening on this side of the courtroom, counsel tells this Court that they should not be required to produce them if they are available from another source, i.e., the government. Now, if that's so, what is it that is available from the government? I don't want to beat this horse, Your Honor,

(Tr. 103)

MR. RUBINO: Yes, I testified, I didn't testify, I alluded to that earlier with Mr. Collins. He specifically showed me how it worked. So what we're doing is bad enough if they got it once, now we're sending it back in case they missed something. Can't we have someone from the magistrate's office do this, his secretary, or somebody like that? Let's get a judicial officer involved in it.

MR. MALMAN: I think, Your Honor, that we are going to have more evidence and hearings about this issue, but I, I dispute Mr. Rubino's rendition of what happened between he and Mr. Collins, the deputy warden at the time. Clearly, Your Honor, I restate, and again as I said this morning, that the general was specifically told that if he had a lawyer/client conversation that he did not wish to have monitored or recorded that it was his responsibility to let them know that that was the MCC procedures, to let them know that he did not wish to have these calls recorded and monitored.

THE COURT: Well, in any event, that's an issue and it's kind of beside the major point that we're here about. What I want to know is how many there are. I don't think that your rights will be further invaded by my having someone from MCC just tell us what the, how many tapes there are of these conversations, without reproducing them. All I want to know is the number and then I will take it from

(Tr. 105)

of United States of America versus Manuel Noriega and others, 88-0079. Mr. Rubino.

MR. RUBINO: Good afternoon, Your Honor, Frank Anthony Rubino.

THE COURT: Mr. Malman, Mr. Moscowitz, you're here for the government, Mr. McAdams I see, and Mr. Lewis as well.

MR. MALMAN: Yes, sir.

THE COURT: This hearing should be very brief actually. And Mr. Bienstock, you are here for CNN, I assume.

MR. BIENSTOCK: I am, Your Honor.

THE COURT: And I want you to know that I have received from the government under seal a list of the telephone calls made, which is indeed under seal and under safe-keeping at the present time. I am not going to go into the detail of it, but suffice it to say that the suggestions that you made and that I subscribed to yesterday would be of absolutely no value in determining what you have or don't have. So I am going to ask that CNN produce for review copies of the tapes that you have. What's your position?

MR. BIENSTOCK: Your Honor, based on the First Amendment to the Constitution of the United States, CNN respectfully declines to produce those documents, and files a motion with the Court to stay that portion of its order

(Tr. 107)

right to a fair trial, but you ask me to do it in the blind. In order words, you suggest that Nebraska, for example, protects you, but you are not giving me any idea as to what it is that is to be published. That seems to me to be patently absurd.

MR. BIENSTOCK: Your Honor, I don't ask you to do it in the blind. I ask you to do it from alternative sources first.

THE COURT: That would be physically impossible unless you and your client are willing to wait a month for a determination of the issue, which is fine with me, if you would like to do that.

MR. BIENSTOCK: Well, respectfully, I disagree, Your Honor. First of all, there are two cases right on this issue, because what the Court has done is shifted the burden of proof under the Nebraska Press case to the press, and the Court knows it's the burden of proof of the movant to prove that there would be an inability to get a fair trial. What the Court has said in its supplemental order is that that burden of proof now is on CNN to come forward and produce its papers, tapes, to prove to the Court that the disclosure of those to the public would not prejudice the defendant's right to a fair trial, and there are two cases right on this issue, Judge.

THE COURT: They don't have them. How can they

(Tr. 119)

saying to this Court, well, we can't broadcast these tapes to you or to the magistrate. It's bizarre that they could take that kind of position before this Court because if they, if they were successful in getting this Court to stay its order and then broadcast the four hundred, to four hundred million people these tapes, then they would say, well, now, the Court is in a position to rule on the —

THE COURT: I understand what you are saying. It's clearly not an invasion of their First Amendment right for us to have the tapes. That hardly permits an argument. The invasion would be in the type of order that I might enter. This is not the case of going into an editorial room, reviewing a movie before it's published or something of that nature. These are, we have an important constitutional right of privacy, and a privilege that's involved here, and unless we know what we're talking about, the Court can't rule on it.

But I do think this, that what counsel is suggesting will be handled by the Court of Appeals, because we have included that in our supplemental order, and the net effect of it will simply be to prolong, if the Court agrees with our basic procedural position, will be to simply prolong a ruling on this particular point when we have to get the tapes, listen to them, and decide what to do about them. So I think that probably the proper thing to do under

(Tr. 120)

these circumstances is to grant the stay in so far as that's concerned, but deny the stay as far as the publication of the tapes is concerned, and I will do that.

MR. BIENSTOCK: Your Honor, I have a, I don't know if, for ease of the Court, I have an order, just a generic order on the stay. I don't know if you want to type up your own or just fill in the blanks.

THE COURT: Let me take a look at it.

(Pause.)

THE COURT: Well, we'll work with it.

MR. BIENSTOCK: Your Honor, in light of — the Court made some comments about the government having produced some documents concerning the tapes to the Court for in camera or under seal, some type of inspection pertaining to I guess the number and statistical data about the tapes. On behalf of Cable News Network, we seek access to that information, and I have a motion for an order to the Clerk of the Court directing access with a supporting memorandum.

THE COURT: Are you familiar with the word hudspa, Mr. Bienstock?

MR. BIENSTOCK: Yes, and the words of the First Amendment, and Your Honor, respectfully — I will give the Court a minute to read it.

(Pause.)

court to limit access to a pretrial suppression hearing, and while the standard of proof necessary may have changed from the decision in Depasqualle through the more recent decisions of the Supreme Court, in the Press Enterprises cases, nevertheless, that case has not been overturned and this Court has the absolute right in circumstances such as here to exclude the press. I think their argument is absolutely absurd and their failure to cite the most important case on point I think is indicative of that.

THE COURT: All right. Anything else, gentlemen, to take up?

MR. RUBINO: Yes, Your Honor.

THE COURT: Mr. Rubino.

MR. RUBINO: Your Honor, as officers of the Court, we feel that we should also do our best to involve ourselves in the fact finding process and we, in fact, have and we would like to state to the Court that we, by information and belief and investigation, we have conducted, we know the Court has directed the FBI to conduct an investigation as to the source of these tapes, but we would like to advise the Court that our information and our investigation has revealed that the United States Department of State has obtained copies of all the tape recorded conversations of General Noriega that were made in the Metropolitan Correctional Institute, and our investigation has further

(Tr. 124)

revealed, Your Honor, that the United States Department of State has provided these copies to the Endara government in Panama. Our investigation and our sources in Panama have advised us, and we have checked the reliability of this, that a high placed individual in the Endara government was, in fact, the person who provided Ms. Marlene Fernandez with these tapes that CNN possesses.

THE COURT: Who is Ms. Marlene Fernandez?

MR. RUBINO: She is the CNN reporter. We would like the Court to be aware of that and we would further ask the Court or request of this Court to issue its order to Warden Pontessa, of the Metropolitan Correctional Institute, to produce in open court a list of all people and all governmental agencies or departments, whether domestic or foreign, whom they have given copies of these tape recorded conversations. We think we may get to the bottom of this quite quickly. Thank you, Your Honor.

THE COURT: All right, sir. Thank you. Any comments from counsel?

MR. MALMAN: I won't comment on Mr. Rubino's specific allegations, Your Honor. We have heard them as has the Court. And the investigation was begun before yesterday's hearing and it will be ongoing.

MR. BIENSTOCK: Your Honor, in light of what counsel just disclosed to the Court, and I don't know

(Tr. 125)

whether it's accurate or not, it seems to me it would be an appropriate, and I am going to ask the Court again, to vacate its order restraining CNN from broadcasting any portions of the tapes since counsel has just basically told the Court that they have been made available to a wide variety of persons, including those outside the United States. They have been disseminated, in essence, to the public, and CNN broadcasting them at this point is not going to make an awful lot of difference to anybody. And we submit that, in light of this type of investigation and this type of disclosure, that it militates against any prior restraint at this time.

MR. RUBINO: If CNN would acknowledge that I am correct, I may acquiesce. Otherwise, this is upon information and belief. We don't know it is a fact. They do.

MR. MAY: Also, Your Honor, the fact that the conversation may have been, as this Court is aware, the fact that an individual has improperly violated a privilege does not mean that the privilege is extinguished. The same thing for classified information.

THE COURT: Doesn't change a thing.

MR. MAY: Right.

THE COURT: Unless, of course, the defendant agrees to their publication.

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF FLORIDA

CASE NO. 88-79-CR

Miami, Florida
November 10, 1990

3:30 o'clock, p.m.

UNITED STATES OF AMERICA

vs.

GENERAL MANUEL A. NORIEGA,

Defendant.

TRANSCRIPT OF HEARING
BEFORE THE HONORABLE WILLIAM M. HOEVELER,
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For The Government:	Myles H. Malman, Esq. -and- Guy Lewis, Esq. -and- Norman Moscowitz, Esq. -and- Dexter Lehtinen, Esq. 155 South Miami Avenue Miami, Florida 33130
For The Defendant:	Frank A. Rubino, Esq. 2601 South Bayshore Drive Coconut Grove, Florida 33133 -and- Jon May, Esq. 155 South Miami Avenue Miami, Florida 33130
For CNN:	Terry S. Bienstock, Esq. 200 South Biscayne Boulevard Miami, Florida 33131
Court Reporter:	Roger W. Watford Official Court Reporter 301 North Miami Avenue Miami, Florida 33128

(Tr. 3)

THE COURT: All right, Mr. Rubino.

MR. RUBINO: Good afternoon, Your Honor. Let me apologize for Jon and I's appearance. We have been at the office since 6 o'clock and preparing briefs and we didn't have time to go home and change.

THE COURT: All right, that's all right. We'll proceed. It's Saturday afternoon.

MR. RUBINO: Your Honor, we have before the Court a motion to hold Turner Broadcasting System and Cable News Network in direct civil contempt of this Court's order. As the Court is well aware, a series of hearings have been had, as stated in my motion, we have had elaborate days of those hearings, and the Court obviously is most familiar with its own orders. So to jump right to the bottom line of this, we would offer into evidence at this time, Your Honor, a copy of a videotape that aired last night at approximately 6:30 p.m., as well as another videotape that aired this morning at 7:00 a.m.

MR. LEHTINEN: Your Honor, may I just apologize for interrupting Mr. Rubino? I am Dexter Lehtinen, of the United States Attorney's Office.

THE COURT: Yes, sir.

MR. LEHTINEN: Mr. Myles Malman and Guy Lewis, who you are familiar with as attorneys on the trial team of the underlying criminal case, are here today to represent the

(Tr. 4)

government and certainly will do so. But as a matter of record, I would like to indicate that if there is any possibility that any tape recordings that dealt with attorney/client privilege matters or any references will be in any way to the contents of those tape recordings the government would appreciate advance notice because Mr. Malman and Mr Lewis have been very concerned and strictly follow the rule that they should not have access to any attorney/client material. They have not had such access, they remain in the posture of having no such access, and any hearing that might inadvertently reveal that matter, if we had advance notice they would not be present.

Mr. Norman Moscowitz, senior litigation counsel in my office, is present to continue to represent the government in any matters in which that content would be revealed. But we would appreciate advance notice from either the Court or counsel should that be discussed. What Mr. Rubino has done is not discuss that, but I wanted to interrupt you, and I apologize, just in the event it were to happen, we need notice.

MR. RUBINO: Yes. I have no intent to go into it in detail. I think they speak for themselves. I would bring to the Court's attention that contained on that tape is a portion of a constitutionally protected attorney/client conversation between General Noriega and members of his

(Tr. 12)

chief judge.

MR. RUBINO: Yes, sir.

THE COURT: To see whether or not he agrees with the motion. He would then decide whether or not I ought to hear it or somebody else ought to hear it.

MR. RUBINO: Yes, sir.

THE COURT: I'm stating the rule rather loosely, but that is the net effect of it. And I think probably that's the way we should proceed.

MR. RUBINO: Yes, sir.

THE COURT: Further delay, but it is important that we comply with our rules. It is at least important that this Court comply with the law, if you get the meaning of that.

MR. RUBINO: Yes, I do, Your Honor. I think Judge King in a matter of minutes could look at the tapes. CNN has submitted it, have they not, sir?

THE COURT: Well, I am going to submit them to Judge King for his consideration. But let me hear further from Mr. Bienstock.

MR. RUBINO: Yes, sir.

MR. BIENSTOCK: Your Honor, the point of the motion is very simply what the Court said at the 5:30 hearing was without the benefit of seeing anything that was broadcast, it was hypothetically if you violate the order,

you broadcast privileged communications, you are in violation of that order hypothetically.

THE COURT: That's right. It was very clear.

MR. BIENSTOCK: We submit, Your Honor, we did not violate that order with the broadcast last night and this morning. We didn't violate the orde it was not privileged communication, and we have argumen on that.

THE COURT: It is not privileged communication?

MR. BIENSTOCK: That is our contention, and we have case law and argument to support that.

THE COURT: I will be glad to hear it.

MR. BIENSTOCK: Before I get into that, I submit Your Honor can't hear it because Your Honor last night, after reviewing the tape for the first time, without the benefit of an opportunity to be heard, to defend the CNN's conduct, determined, obviously determined, that there was a violation of the order and the reporter that published it to the world at large.

THE COURT: I thought I heard, and maybe I'm wrong, a conversation that took place between General Noriega and the attorney's office. Did I misunderstand that?

MR. BIENSTOCK: No.

THE COURT: And which witnesses were discussed, respective witnesses.

(Tr. 14)

MR. BIENSTOCK: That is correct.

THE COURT: I thought I heard that.

MR. BIENSTOCK: And we submit that is not a privileged communication under the circumstances in which it was made.

THE COURT: You mean because you had it?

MR. BIENSTOCK: No. And, as I say, Judge, I don't want to waive the recusal issue by arguing the merits of the motion. I submit that it's improper and would violate the rule. I believe the rule is clear and the motion was legally sufficient and that CNN is in conjunction with the rule and under due process rights under the Fifth Amendment is entitled to a prior hearing before a court makes up its mind as to whether or not —

THE COURT: Well, you are not entitled to a prior hearing, but you are entitled to whatever consideration the statute affords you where a motion of this type is made. And, of course, you shall have whatever the law affords you whether or not your client elects to follow the law. And that will be the subject of a determination after you have had your rights under the statute.

MR. BIENSTOCK: Yes, sir.

THE COURT: Now, does the government have any position to take on this? I'm certainly not requiring a response. But you have the right to comment if you wish to.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 88-0079 Cr Hoeveler

Miami, Florida

November 12, 1990

UNITED STATES OF AMERICA,

Plaintiff,

v.

MANUEL NORIEGA, et. al.,

Defendant.

The above entitled cause came on for final hearing before the Hon. William Hoeveler, Judge of the above-styled court, at his office in the courthouse, Miami, Florida, on November 12 at 12:00 noon pursuant to notice.

APPEARANCES:

ON BEHALF OF THE PLAINTIFF

Office of the United States Attorney
155 South Miami Avenue
7th Floor
Miami, Florida
BY: DEXTER W. LEHTINEN, ESQ.
NORMAN A. MOSCOWITZ, ESQ.
PATRICK SULLIVAN, ESQ.

ON BEHALF OF THE DEFENDANT

JON MAY, ESQ.
155 South Miami Avenue
Miami, Florida

ON BEHALF OF CNN

FRATES BIENSTOCK & SHEEHE
200 South Biscayne Boulevard, Suite 3160
Miami, Florida
BY: TERRY S. BIENSTOCK, ESQ.

(Tr. 3)

THE COURT: Welcome. Terry, it's your move.

MR. BIENSTOCK: Judge, I appreciate your convening this hearing on such short notice and certainly on a federal holiday, but we felt it was important in light of how this has all been proceeding that we have this meeting as quickly as possible. I think everyone recognizes, Judge, that the issue, the real core issues, have gotten sort of lost in sort of a spiral that's been happening in the flurry of activity over the last couple of days, and the real issues are what has the government done and —

THE COURT: Excuse me one second. We want this to be an open hearing. If any anyone wants to come in, they can. Thank you, anyway. Go ahead.

MR. BIENSTOCK: What the government has done and then the first amendment issue. And we intend to address the pure first amendment issue first and the prior restraining issue. However, we recognize the trouble this court and the 11th Circuit had was knowing what we have and how the court can identify whether or not that'll be a problem upon disclosure and deny General Noriega

(Tr. 4)

right to a fair trial. What we ask to propose is a way to accommodate the court's concern and to protect our first amendment rights that we've asserted throughout this case.

Let me preface by saying that CNN has no intention to telecast any attorney-client privilege conversations until it gets relief from the Supreme Court. It has not done so since the 11th Circuit ruled. This story has run its course, and there's no expectation or intention of it running again, again until the Supreme Court gives some relief.

The mechanism which we're going to propose is very similar, Judge, to what was used in the Pentagon Papers case, and that is to — what we propose is to use Magistrate Tournof (phonetic), as the court had suggested earlier and that the government go to Magistrate Tournof and disclose or identify the attorney-client conversations it has without disclosure to anyone else; that we go to Magistrate Tournof one on one and disclose to him the attorney-client conversations that we have with sufficient identification so that he can then compare the lists and determine what he needs to listen to, which the government would

then have and could produce to him specifically, and he could make recommendations to the court.

We submit that that will solve the court's threshold problem of being able to determine the issue and still preserve, I think, all the interests of the parties. What we disclose to Magistrate Tournof, we would ask that it not be disclosed to anybody else, and we would agree that reciprocally whatever would be disclosed by the government would not be disclosed to anyone else. Magistrate Tournof would be the only one with that knowledge. That is our proposal as to how we move forward on these issues.

THE COURT: What end would that serve?

MR. BIENSTOCK: That would give the court the ability to do the determination it wanted to do, and that is whether or not the publication of these conversations would impact in any significant way General Noriega's right to a fair trial and then the court can make a determination --

THE COURT: What if I decide they won't and permit to you play them?

MR. BIENSTOCK: Then we go ahead and are permitted to play them and the injunction is

(Tr. 6)

lifted.

THE COURT: That moots the issue in the Supreme Court.

MR. BIENSTOCK: I don't think so, Judge. I think it's an issue that has occurred and is capable of repetition. I don't think it moots it.

THE COURT: That's why I think you ought to keep them. Let's let it play out. Because the issue I want decided is the issue of what CNN has done in this case, and that's the issue that's going to be before the Supreme Court, whether or not a broadcasting agency can come before the court and in the one hand argue the Nebraska case and say, Judge, you have to rule on the facts to see whether or not there's damage done to the defendant and then in the next breath say, but we're not going to let you have the facts to decide it.

That's the issue that's going to be before the Supreme Court, and I think we ought to let that issue stay just the way it is before the Supreme Court. I'm reacting to your suggestion. I want to hear from other counsel.

MR. BIENSTOCK: Our concern was, assuming

(Tr. 7)

we have an order that says we can't play the tapes, number one, and number two, we have to produce the tapes, we tried to address both issues. I think what the court's suggesting, we've addressed the first issue and leave the second pending.

THE COURT: I'm not even sure I have jurisdiction.

MR. BIENSTOCK: I thought you might raise that, Judge.

THE COURT: Let's hear from other counsel.

MR. LEHTINEN: The clear intent of the court's order and the proper role of the court is to ask CNN and order them to make available the tapes they propose to play.

There's no point in going to the government. The government has no idea what tapes CNN has. The government has no intention of getting further into revelation of any tapes, if indeed they came inadvertently through some error in government process. And the easiest shortest route is, as Your Honor ordered, for seven tapes to be turned over in camera so they can be heard by a member of the bench.

Noriega's conversations were legitimately

(Tr. 8)

taped in very large numbers as Your Honor knows, taped with waivers. That may be an argument at a later point, but large numbers of tapes exist and have been ruled on by Judge Scott previously of the Southern District of Florida that such taping is perfectly legitimate. It's done in order to keep drug deals from being done on the telephones. It's done in order to keep escapes from being calculated on the telephone.

And it serves no purpose for the government to try to provide large numbers of tapes that have no relationship to the case when in fact there are seven tapes in existence that can easily be observed without any damage to CNN. There is no detriment to CNN by allowing the magistrate to listen to copies of these tapes except that it provides the evidence necessary to the court to make its findings, properly frame the issues, so then the appellate courts and the Supreme Court could have determined not the issue that Your Honor just said is properly now before the court in the appellate court, but could have determined Nebraska on its face, whether the balancing that's required under the law, given the facts and the circumstances,

(Tr. 9)

permitted their playing them or restraining them.

But there's no purpose in the government — our limited comment is there's no purpose in the government trying to provide large numbers of tapes that — when CNN has them, and we have no idea in fact whether or not they are government-made tapes or any other source.

THE COURT: Let me ask Mr. Bienstock, how many tapes did you contemplate the government was going to produce?

MR. BIENSTOCK: I don't know. We're only —

THE COURT: All other tapes than those which you have?

MR. BIENSTOCK: We're only talking about attorney-client conversation tapes. I have no idea how many the government has. It may be two. It may be twenty.

THE COURT: I do.

MR. BIENSTOCK: I understand.

THE COURT: I want to tell you there's no way we can do it within the next several months.

MR. BIENSTOCK: All they have to do is, assuming there is that list — say there are 50 attorney-client conversations that have been

(Tr. 10)

taped, and we produce five or one or ten, whatever the number is, with enough specificity so the magistrate can compare. He then knows what CNN has and what is the potential — what potential conversations could be broadcast.

MR. MOSCOWITZ: I think Mr. Bienstock is offering this compromise too late. This court ordered CNN to turn the tapes over to the court for review. At that point, they refused. The 11th Circuit has affirmed that order, saying the proper procedure and the most expeditious procedure is for CNN to do what the court has ordered, which is to turn the tapes over. Now they're offering for a compromise, which may have made sense to talk about compromise prior to the process beginning, but now it's too late. We have guidelines from the Court of Appeals what the appropriate procedure and —

MR. BIENSTOCK: The court of appeal was under the misperception that the court had not entered a stay on the production of the tapes, which the court had.

THE COURT: Well, had until they decided it. It's perfectly obvious what the decision would be in either direction. They've made that

(Tr. 11)

clear, stay or no. And obviously my stay in requiring you to produce the tapes was until the Court of Appeals ruling. The Court of Appeals has ruled. They said you should produce the tapes.

Now the thing that everybody seems to be missing — not everybody. I'm sure that many of you have it. I think the thing that we continue to permit escaping us is that I have not ruled on the merits of this case.

Now, I know that you gentlemen who are involved in First Amendment matters feel that any stay of any kind prohibiting you from publishing what you want to publish is an invasion of your right. But what you've done is present me with a situation from which I really had no escape.

That is, I cannot permit a news organ to come before me and say, we have some information that we're going to publish. We recognize that it may be in a very limited area the First Amendment versus the Sixth and the Eighth Amendment or even the Fifth Amendment, due process. We realize these amendments may be impacted by what we're going to do. We also

(Tr. 12)

realize that generally this is a factual question that the court has to decide, and we are in the unique position of having all the facts in our hands, and you're going to have to rule on this case without knowing what the facts are.

That simply could not be permitted, and that's the way the 11th Circuit saw it also. And I trust and hope that's the way the Supreme Court of the United States is going to see it because this is really not a First Amendment issue except in a very limited sense, and that is, can a news organ do whatever it wants to do regardless of what the facts are, regardless of what the issues are, in connection with the right of free speech.

I just don't think that can be the law. I think there has to be an orderly procedure. I asked for an orderly procedure. It was refused me, and I think we simply ought to go ahead and let the Supreme Court decide whether or not I was correct, whether or not the Court of Appeals 11th Circuit was correct.

To attenuate that issue now by offers of producing the tapes and letting me now rule on

(Tr. 13)

the merits is to escape the real issue in the case. Now, if you want to present me with a program which says we're going to dismiss our appeal to the Supreme Court. We're going to give the tapes to you, and we're going to let you rule on the basic question in the case, I say, fine, let's go to it. Let's go after the merits. And then if I rule against you, you can take it to the Supreme Court. And if I say you can produce what you've got to produce, fine, then this tempest in a teapot — which is all that it is, except for the very basic problems involved. But as far as this case is concerned it's a wart on our shoulder.

We're here to try to get the Noriega case to trial, and things like this just divert our course. If you want to say to me, look, we're going to produce the tapes. You look at them or you have the magistrate look at them, rule on them. If we lose, we take it up. If we win, we win. That's fine with me. I'm perfectly happy to do that and let the matter stay where it is.

MR. BIENSTOCK: The concern we had was obviously we did not want to be in a future contempt situation by preserving those issues,

(Tr. 14)

unless the court keeps the stay in place.

THE COURT: I'll consider that.

MR. BIENSTOCK: Want to chat about that?

MR. KORN: I'd like to chat about that.

MR. BIENSTOCK: Can we have a minute?

THE COURT: Indeed, while I can get exercise from time to time, I'm also long on forgiveness, if the right thing is done, so why don't you talk about it.

MR. BIENSTOCK: Thank you, Judge.

(Thereupon, a brief recess was taken, after which the following proceedings were had:)

MR. MAY: Jon May on behalf of General Noriega. I have made a proposal to CNN, which I don't know if this court will find satisfactory. So long as this court's temporary injunction remains in effect and so long as CNN agrees that it will no longer be in any further contempt of the court by broadcasting the tapes, we would not oppose a stay of the contempt hearing as well as a stay of the production of the tapes until the Supreme Court decides whether or not to consider the case on the very narrow issue.

That way we can decide the very narrow

(Tr. 15)

issue as this court has framed it. And if the Supreme Court thereafter says, well, it should be remanded for a further hearing on the merits, this way CNN is not in contempt for each day from this point on.

We're not trying to punish CNN for attempting to preserve their appellate rights. We believe they should be punished for the willful disobedience of the court's order up until this point.

But again, we would not oppose a stay from this point until the Supreme Court decides whether or not they're interested in reviewing the case. I think that's a reasonable suggestion on our side. I don't know if the court finds that reasonable.

MR. BIENSTOCK: That would be acceptable with one caveat, not waiving our claim that the tape we played is a privileged communication, just so that's clear. Mr. May termed it attorney-client privileged communication.

MR. MAY: We will have a dispute later on over that.

MR. BIENSTOCK: Other than that, we think that's a reasonable approach, and we agree to do

that.

THE COURT: Any comments?

MR. LEHTINEN: Insofar as it doesn't request the government turn over any tapes, we don't really have any comment or position on that. I would point out that the court's order dealt with a number of things, the right to fair trial, and so did the 11th Circuit talk about the right to a fair trial, notwithstanding whether there were attorney-client communications and notwithstanding whether or not the government's action in taping was perfectly legal, but nonetheless broadcasting in a broad context might jeopardize the right to fair trial.

I make that comment only because I believe the reference to attorney-client privilege is often used as a shorthand legitimately in communication but that it stands for all of the constitutional issues at play, including right to fair trial, whether or not there was any breach of the attorney-client privilege.

THE COURT: That's a fair point.

MR. LEHTINEN: With respect to the specific discussion, the government has no position.

(Tr. 17)

MR. MAY: We, of course, may be filing other motions against other parties having to do with this issue, which may require hearings independent of anything to do with CNN.

THE COURT: Is that satisfactory, gentlemen?

MR. BIENSTOCK: Yes.

THE COURT: Let's make it clear that we all understand each other. Would you recite that again?

MR. MAY: Our agreement with the court and CNN is as follows: This court's temporary injunction will remain in effect through the pendency of the proceedings that have been instituted in front of the United States Supreme Court today. The court's stay of its order of production, which had previously been announced on Friday, Saturday, whatever — I'm losing track of the days —

THE COURT: Saturday.

MR. MAY: — will also remain in effect until the United States Supreme Court rules on CNN cert petition.

THE COURT: Saturday was the Court of Appeals —

(Tr. 18)

MR. MAY: Court of Appeals ruling, yes, Your Honor. The contempt proceedings which we have requested will be stayed until the United States Supreme Court rules on CNN's cert petition.

THE COURT: Now, counsel should understand, as I'm sure you capable counsel all do, that your position on contempt really doesn't rest anymore with the decision of the Supreme Court.

MR. BIENSTOCK: We understand that.

THE COURT: You understand that. I don't want there to be any waivers in that connection. That's an independent point.

MR. BIENSTOCK: We understand that, Your Honor, and we have defenses that at the appropriate time we'll raise.

MR. MAY: No party will be waiving any arguments as to the contempt that occurred up until this point.

THE COURT: So in effect what you're suggesting and what counsel are accepting is that everything simply remains in status quo. No tapes are disclosed. The issues remain the same. And when the Supreme Court rules, either by granting a stay, which would in effect moot

the point, the basic point, or by denying the stay and referring it to the whole court, or denying certiorari, we just do nothing until we hear from the court.

MR. BIENSTOCK: When we talk about the tapes, we're talking about the attorney-client conversation tapes?

THE COURT: Who is going to make that determination?

MR. BIENSTOCK: Your Honor, that's all —

THE COURT: Is CNN going to make it again?

MR. BIENSTOCK: That's all that was in the motion that Noriega filed. That's all the court ever ruled —

THE COURT: Maybe we ought to get our facts well defined, and let's be perfectly frank with each other. May we? It's my understanding you have seven tapes, is that correct?

MR. KORN: I'm not certain of the exact number, Your Honor.

THE COURT: Do you wish not to answer that question on some constitutional basis? Then we're kind of back where we started. Let's let our hair down just a little. We all are hopefully in search of the truth, which includes

(Tr. 20)

doing what's right according to the law.

Now, if you've got something that you think you have the right to publish but you think there's some question about it, then we ought to talk about it.

MR. BIENSTOCK: Judge, we will not publish any attorney-client conversations. I think I can fairly represent, if there is any doubt on whether or not it is an attorney-client conversation, we will come to the court first.

MR. MOSCOWITZ: Does that include conversations with the staff of the attorneys as well?

MR. BIENSTOCK: Yes.

MR. LEHTINEN: In other words, the argument as to whether or not a conversation continued to have privilege with it is not the distinction you're making?

MR. BIENSTOCK: No.

MR. LEHTINEN: It's any conversation with attorney employees or with the attorney, whether or not you or any party would later argue it was or was not privileged, you are including those as tapes you won't play?

MR. BIENSTOCK: That's correct.

(Tr. 21)

MR. MAY: I have one request of CNN, sort of a technical request. I don't know what your security procedures are. Of course we're very concerned whatever tapes you possess and whatever feeds that might be — I know sometimes CNN distributes, feeds, to other news organizations that thereafter rebroadcast. I ask that you do everything possible to get in your physical possession and under lock and key all those tapes.

MR. BIENSTOCK: John, I can represent that we sent and it's been in the media that we sent notices to all of our affiliates to either return or destroy any copies they may have made of that telecast.

MR. KORN: That's correct.

One technical inch accuracy, Jon, in your description, the proceedings in the United States Supreme Court, as we sit here, have not been filed, but they will be.

MR. MAY: Right.

THE COURT: Now, the Court of Appeals seemed to expand the scope of the potential damage in its opinion to areas beyond that encompassed strictly by attorney-client

(Tr. 22)

privilege, but talked about areas that would go to the basic question of whether or not the defendant could get a fair trial. What do you think about that?

MR. BIENSTOCK: It hasn't been the subject of any motion or any court or this court's ruling. I think it's not ripe to address that.

THE COURT: I'll grant you that. What we've been talking about is attorney-client privilege, the Sixth Amendment versus the First Amendment rights.

MR. BIENSTOCK: The other aspect is simply not ripe. No one's filed anything pertaining to it, neither the government nor the defendant.

MR. MAY: There are a couple of issues as to that. As this court is aware, we have alleged that CNN got possession of these tapes essentially by way of the State Department. We're asking, until we know how these tapes, these recordings were disseminated — there are two possible scenarios here.

The government would have — I think the government would have this court believe or would certainly hope that some guard at MCC made a type and tried to sell it to some news

(Tr. 23)

organization, in which case the argument would be that since their agents had not or their prosecutors had not heard the conversations, there's a lack of prejudice, and as a result, there should not be a dismissal.

On the other hand, if in fact the situation is far more sinister, if in fact the dissemination occurred by way of the State Department, then we have something much more intentional, something much more significant, which may or may not require a showing of prejudice on the part of the defense.

At this point, we have acted with dispatch to keep CNN's dissemination of these tapes from polluting the pool of potential jurors and to keep the dissemination of other conversations which they have not already broadcast, which could really harm us, from occurring. So we have acted to minimize whatever prejudice in any possible scenario.

What we will be doing this coming week, whether or not it's through filing a motion to dismiss or filing for an inquiry or the appointment of a special prosecutor, until we get to the bottom of how these tapes were

(Tr. 24)

disseminated to the news media, it's impossible for us to know both the nature of the injury as well as the possible remedy that we might be entitled to.

MR. MOSCOWITZ: It does seem two separate issues. As I read the circuit opinion, the issue is what prejudice would this defendant suffer by broadcast and publication of these tapes. I mean, that issue can be addressed, I think, by a review of the tapes without regard to the this other issue of whether there was wrongdoing by anybody involved in CNN obtaining those tapes.

The other issue is one we're concerned about, of course, also. We've launched our own inquiry. Interviews have been going on. That's a matter which we expect the defense to bring in argue, and we're going to have to address. It makes sense to kind of so far as possible separate what is potentially a messy, large issue from what is a discrete issue, which can be handled by reviewing the seven, six, eight tapes, whatever they are.

MR. MAY: Unfortunately, Your Honor, I respectfully disagree with my former colleague

(Tr. 25)

Mr. Moscowitz. It maybe as simple as Norman suggests. It may not be. As Frank Rubino indicated to the court, depending on what is contained on those tapes, it may not be possible for the magistrate to determine how significant they are to our case without us making a very full disclosure as to the nature of our defense.

Again, in our brief to the court, we believe that's supported by the decision of the Supreme Court in the Snapp (phonetic) case where they said only the CIA knows how significant a disclosure can be. And in our case, only we can truly know, without making very open disclosure to the magistrate as to the nature of our defense. I don't think it's quite as simple as Norman suggested.

THE COURT: What do you mean recommend?

MR. MAY: Right now, before this court considers what's on those tapes and what has been disseminated, this court is going to have to try to find out just who got the tapes and who distributed them. I think until we know that — unfortunately we don't know if just CNN has these tapes or if they're floating around. I have the utmost respect for the prosecutors

(Tr. 26)

and the integrity of the prosecution team. I know when they say they haven't turned CNN on, they haven't turned CNN on.

But there are a whole bunch of people involved in the case throughout the United States government, different agencies. If the State Department had these tapes, I don't know whether the DEA had them, the CIA had them. I don't know what witnesses the government has who may have been exposed to the tapes.

We have a lot of questions that have to be answered, and it's not — before we get into issues of us having to reveal the nature of our defense, I think we have to have those questions answered first.

MR. LEHTINEN: If I could add to what Mr. Moscowitz said, the question of whether or not the court should listen to the tapes and under due process, under right to a fair trial, or under any attorney-client protected concepts, the tapes should not be played, is quite distinct from the question of what governmental misconduct, if any, is involved.

THE COURT: Indeed.

MR. LEHTINEN: In fact, the question which

(Tr. 27)

seems to be on the floor now, because there was a temporary resolution of matter that in any way touched attorney-client, and now the discussion is to be directed at tapes between Mr. Noriega and some third party that do have no connection to attorney-client, there's no question but that under Judge Scott's ruling and many rulings around the country that such tapes made at MCC may be perfectly legitimate.

That may not resolve the fair trial issue. It certainly resolves the question now being discussed is the question of tapes between Mr. Noriega and some other person unrelated to his lawyer. And those are clearly, under law and precedent, taped. Everyone knows they're taped. The written waivers cover those.

But it may not resolve the issue as to whether or not they should be played if they requested that they not be played under some fair trial concept, quite distinct from the government's right to have them and use them for whatever purpose it wanted to.

MR. MAY: Your Honor, I'm sorry. I know where we're going with this. We have not had a dispute with the government over their right to

(Tr. 28)

monitor non-privileged communications. I think what's going to come out here is the government is eventually going to agree with us that there was this tape made of communications of non-privileged matter and privileged matter, and because of their concerns of some possible coup in Panama, these tapes, all of them, including privileged matter and non-privileged matter, ended up with other agencies who made the decision to disseminate them indiscriminately.

I don't have a dispute with the government that, yeah, they had a right to monitor. They might have had a right to monitor some conversations that did not involve attorney-client communications. But again, this is not going to resolve itself as simply as the United States attorney suggests.

THE COURT: You have some tapes that apparently contain mixed conversations, that is, when I say mixed, some that clearly involve attorney-client, some that may be political in nature, with other people, or even personal in nature.

Once again, I don't know what you have, and once again, it appears that you're unwilling to

(Tr. 29)

tell me. I can only ask you to read the — as I'm sure you have, probably a couple of times — the 11th Circuit opinion.

I'm going to stay, pursuant to your agreement, the question of contempt. I'm going to stay all of the other questions that are involved pursuant to agreement pending the Court of Appeals — the Supreme Court ruling.

But the question of contempt remains, and if you elect to play a portion of the tape that seems to be in violation, not of my order, but of the order of the 11th Circuit Court of Appeals, that's a matter that you may have to again take up. I think, you better look at it that way.

It would seem to me that the discrete thing to do is to wait until the Supreme Court has taken a position, and then do what you want to do. Nobody's going to get out of breath in the meantime because they haven't heard some tape between General Noriega and his wife.

I think that's the discrete thing to do. I can't tell you what to do. I've tried that once, and it didn't do any good. But I would recommend that you follow that procedure.

(Tr. 30)

Now, I think we understand each other, that everybody is just going to stay right where they are. The matter is going to the Supreme Court.

Now I want to get practical. Aside from the fact that you have an unfavorable decision from the 11th Circuit, which I'm sure you'd rather not have on the books at this point, it would seem to me that the smart way, the inexpensive way, the reasonable way to handle this thing is to get down to the issues right now, and let's decide them rather than going any further.

MR. BIENSTOCK: On the preliminary injunction?

THE COURT: Yes, and I'm open to do that, if you want to. I would be interested in seeing what the Supreme Court does with this somewhat novel question. On the other hand, I'd like to get this disposed of so we can go on with our lives.

So I present the alternative situation to you, and that is that we stop this running around on this question and get down to the basic issue of what's in the tapes, whether or not a preliminary injunction should be imposed.

(Tr. 31)

And then if the decision is unfavorable, take it wherever you want to.

MR. BIENSTOCK: We will certainly, in light of all of this, evaluate that as an alternative and make some decision and advise the court.

THE COURT: All right. If you decide not to do that, then of course this agreement that you've entered into will be in full force and effect, which means that nobody does anything until the Supreme Court rules.

You don't produce anything. I don't look at or Judge Tournof doesn't look at anything, and we let the court rule on the record that they will have before them.

So you think. There are your two options. One is to let it proceed on the basis of the agreement that has been proposed. The other is that we stop the litigation at this point. You present the tapes.

The court through the magistrate decides whether or not they ought to be suppressed, or if so, what portions of them ought to be suppressed. And then if you don't like the ruling, you can take it further. If you do like it, someone else can take it further. All

(Tr. 32)

right?

MR. BIENSTOCK: I assume the hearing for Tuesday is off then?

THE COURT: As far as you're concerned, it is, yes.

(Thereupon the hearing was concluded.)

CERTIFICATE

STATE OF FLORIDA
COUNTY OF DADE } ss.

I, MELANIE S. GOODES, being a Registered Professional Reporter, do hereby certify that the cause of United States of America pending in the above-styled court, was heard before the Hon. Hoeveler, as Judge, on November 12, 1990; that I was authorized to and did report in shorthand the proceedings and evidence in said cause; and that the foregoing pages, numbered from 1 to 32, inclusive, constitute a true and correct transcription of my shorthand report of the proceedings at that time.

IN WITNESS WHEREOF I have hereunto affixed my hand this 12 day of November 1990.

MELANIE S. GOODES, NOTARY
PUBLIC AT LARGE.

Acuse de Recibo del Recluso

U.S. DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS

ada recluso debe de llenar esta forma cuando inicia, su entrada bajo la custodia del BOP. El personal tambien llenara y firmara en as partes correspondientes. Cuando un recluso desea hacer un cambio en qualquier seccion entonces esta forma se dato volver a lenar.

Nombre del Recluso _____ Numero de Registro _____ Institucion _____

1. CORRESPONDENCIA

El personal de cada institucion del Bureau de prisiones tiene la autoridad de abrir toda la correspondencia dirigide a usted antes de entregarsele. "Correo Especial" (Cartas del Presidente y Vicepresidente de EEUU., abogados, miembros del Congreso de EEUU., embajadas y Consulados, El Departmento de Justicia (A excepcion del Bureau de Prisiones pero incluyendo los abogados de la Oficina del Procurador General de Justicia), otros oficiales de ejecuciôn de la ley federal, Procurador de Justicia Estatal. Abogadois del fiscal, Gobernadores, Tribunales Federales de los EEUU. y Estatales) solamente puden abrirse ante usted para inspeccionar las por contrabando. Este procedimiento solamente ocurre si el remiteniz el o ella se identifican adecuadamente en el sobre y esta marcado Correo Especial — Ábrase solamente ante la presencia del recluso". El personal puede abrir y leer otra correspondencia.

Si usted no quiere que se abra y se lea su correspondencia general, la institucion la regresara al Servicio Postal. Esto significa que usted no recibira tal correspondencia. Usted puede elegir si quiere que se le entregue su correspondencia general fujeto a las condiciones arriba mencionadas, o que se

regrese al Servicio Postal. Cualquiera que sea su seleccion. el correo especial sera entregado a usted, después de abririo ante usted e inspeccionario por contrabando. Usted puede hacer su eleccion firmando la Parte I o la Parte II.

PARTE 1 — Correspondencia General para Regresarse al Servicio Postal.

He leido o me leyeron a la notificacion que prosigue, con relaccion al correo. No quiero que mi correspondencia general se abra y de lea. SOLICITO QUE EL BUREAU DE PRISONES REGRESE MI CORRESPONDENCIA GENERAL AL SERVICIO POSTAL. Entiendo que la correspondencia especial se me entregara, después de abrirla e inspeccionaria por contrabando.

Nombre _____ Numero de Registro _____ Fecha _____

PARTE II. — Correspondencia General para Abrirse, Leerse y Entregarse

Me leido o me leyeron la notificacion que prosigue con relacion al correro. DESEO RECIBIR MI CORRÉSPONDENCIA GENERAL. Entiendo que el Bureau de Prisones puede abrir y leer mi correspondencia general si decido aceptar la misma. También entiendo que correspondencia especial se me entregarâ después de abrirla ante mi y haya sido inspeccionada por contrabando.

Nombre Noriega, Manuel Antonio Numero de Registro 38699-079 Fecha 1/29/90

Recluso (Nombre) _____ Nûmero de Registro _____, se nego a firmar esta forma. A el (ella) se le advirtio del Bureau de Prisiones retiende para si mismo la autoridad de abrir y leer toda correspondencia general. Al recluso tambièn se advirtio que su negacion de firmar sera interpretada como una indicacion de que èl (ella) desea recibir

correspondencia gene sujeto a las condiciones arriba mencionadas.

Nombre con Letra de Molde/Firma del Miembro del Personal
/s/ MANUEL ANTONIO NORIEGA

Fecha 29 Enero 1990

2. AUTORIZACION PARA LA DISPOSICION DE FONDOS

Mientras confinado en una institucion de prisiones bajo custodia del Procurador General de Justicia de EEUU. o de la persona èl norrada, a un recluso se le prohibe recibir directamente o poseer (a menos que tenga autorizacion de la institucion local) (illegible) el efecctivo o cheques, u otras formas de instrumentos negociables. Para llevar las cuentas de los fondos recibidos a nombre recluso, El Bureau de Prisiones establece para cada recluso una Cuenta de Fondos Fiduciarios para Prisoneros. El Director Bureau de Prisiones o la (s)persona (s) numbrada (s) por el Director funciona como custodio de los fondos que recibe el rec (illegible) esta encarcelado bajo la custodia del Procurador General de Justicia de EEUU.

(Illegible) presente (autorizo) (no autorizo) (tache la que no quiera) el Director del Bureau de Prisones, o a la (s) persona (illegible) (s) por el Director o el Alcaide o la (s) persona (s) autorizada (s)por el Alcaide en esta o en otra institucion federale (illegible) puedo ser recluido posteriormente, para que endosen todos mis cheques, ordenes monetarias, o giros Bancarios, (illegible) instrumentos negociables, para que se depositen y se acrediten en mi Cuenta de Fondos Fiduciarios para Prisioneros por (illegible) yo prisonero en el Bureau de la Prisiones. Entiendo que si no proveo esta autorizacion autorizaciôn, no podré (illegible) monetarias, o giros bancarios u otras formas de instrumentos negociables mientras estoy encarcelado (a).

(illegible) doy por enterado que todos los instrumentos negociables que se me envien deberan de referirse a mi nombre y a mi (illegible) para proveer un deposito adecuado a mi cuenta. Si mi nombre y numero de registro no estan como referencia, el oficial Oficina de Correos de la institución puede devolver el instrumento negociable al remitente.

Firma del Relcuso /s/ Manuel Antonio Noriega

Fecha 29 Enero 1990

Recluso (Nombre) _____ Nùmero de Registro _____, se nego a firmar esta forma. A èl (ella) advirtio que su negacion a firmar esta forma sera interpretada como una indicacion que él (ella) no autoriza al Bureau de Prisiones que endosen sus cheques, ordenes monetarias, o giros Bancarios, u otros formas de instruments negociables para deposito y credit su Cuenta de Fondos Fiduciarios para Prisioneros y que èl (ella) no recibira dichos fondos mientras permanezca encarcelado (a).

Nombre con Letra de Molde/Firma del Miembro del Personal

_____

Fecha _____

Distribucion: Original — Expediente Central, Copia — Recluso. Reemplaza B-P Formas 61 & 69 las Registro-109. Feb. 1984.

3. MONITORIZACION DE LAS LLAMADAS TELEFONICAS DE LOS RECLUSOS

El Bureau de Prisones reserva la autoridad de monitorizar (esto incluye grabar) conversaciones en qualquier telefono localizado dentro de la institucion, dicha monitorizacion se hara para conservar la seguridad y el orden administrativo de la institucion y para proteger al poblico. El uso de los telefonos de la institucion por el recluso constituye su consen-

timiento a esta monitorizacion. Las llamadas a un abogado, hechas como los reglamentos indican, no seran monitorizadas.

He leido o me leyeron (tache la que no quiera) la notificacion arriba mencionada sobre la monitorizacion de las llamadas telefonicas de los reclusos. Me doy por enterado que las llamadas telefonicas que yo haga de los telefonos de esta institucion las pueden monitorizar y grabar.

Firmo del Recluso /s/ Manuel Antonio Noriega

Fecha Enero 29, 1990

Por la presente certifico que la informacion arriba mencionada fue (tache las declaraciones incorrectas) (provista al recluso para que la leyera) y la (leyo y se le explico cuidadosamente al recluso arriba mencionado). El recluso (firmo/ (se nego a firmar).

Nombre con letra de Molde/Firma del Miembro del Personal

(illegible)

Fecha 1/29/90

NOTIFICACION EN CASO DE MUERTE/ENFERMEDAD, DISPOSICION DE PROPIEDAD

En caso que yo muera, ordeno que mi Esposa (parentesco), cuyo nombre es Felicidad (illegible) con domicilio en (illegible) se le notifiqu y que todas mis efectos personales, incluyendo el dinero que queda en mi cuenta, o dinero que me deba el Bureau de Prisones, le sean remitidos a el o a ella.

En caso de que el personal del Bureau de Prisones no pueda localizar la persona arriba mencionada, despues de una bus-

queda razonable, autorizo la substitucion de la siguiente persona en su lugar.

(illegible)	12405 SW 56th Street, Miami, FL 33175
Nombre (Parentesco)	Direccion

En caso que ninguno de los individuos arriba mencionados pueda localizarce, despues de una bosqueda razonable, autorizo al Bureau de Prisones que remita las propiedades arriba mencionadas a cualquier miembro de mi familia como puede ser indicado en mi lista de visitas, o en la ausencia de tal a cualquier otra persona en dicha lista.

Ademas estoy de acuerdo que se disponga de mi propiedad personal localizada en la instituc on de esta prision, incluyendo ropa, de acuerdo con los reglamentos del Bureau de Prisones.

En caso de una enfermedad seria u otra emergencia, autorizo a la institucion que se ponga en contacto con las personas arriba mencionadas para que se les notifique de mi condicion. Tambien deseo y autorizo que los siguientes personas sean notificados.

Nombre	Parentesco	Direccion	Numero de telefono

Firma del Recluso /s/ Manuel Antonio Noriega Fecha Enero 29-1990

Por la presente certifico que la notificacion arriba mencionada fue (tache la declaracion incorrecta) (proveida al recluso para que la leyera) y fue (teida y explicada explicitamente) al recluso arriba mencionado) ante el recluso (firmo) (se neco a firmar) esta notificacion, a los 29 dias del mes de Enero de 1990.

Nombre Impreso/Firma del Miembro del Personal
(illegible)

Fecha 1/29/90.

Supreme Court, U.S.
FILED
NOV 17 1990
JOSEPH F. SPANIOL, JR.
CLERK

(7)

Nos. A-370 and 90-767

In the Supreme Court of the United States

OCTOBER TERM, 1990

CABLE NEWS NETWORK, INC., ET AL.,
APPLICANTS-PETITIONERS

v.

MANUEL A. NORIEGA, ET AL.

ON APPLICATION TO STAY THE ORDERS OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA TEMPORARILY BARRING PUBLICATION OF TAPE RECORDINGS BEFORE IN CAMERA REVIEW PENDING CONSIDERATION OF A PETITION FOR A WRIT OF CERTIORARI AND ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the First Amendment prohibited the district court from temporarily barring petitioners from publishing tape recordings of conversations between respondent, a criminal defendant awaiting trial, and his attorneys, before submission of those tape recordings for an in camera review, in order to enable the court to make the factual findings necessary to determine whether a prior restraint on publication is permissible.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion and order of the court of appeals (Pet. App. 1a-17a, 18a) are not yet reported. The orders of the district court (Pet. App. 19a-24a, 25a-29a) are not yet reported.

JURISDICTION

The judgment of the court of apeals was entered on November 10, 1990. The application for a stay

of the district court's orders and the petition for a writ of certiorari were each filed on November 15, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 2101(f).

STATEMENT

1. Respondent Manuel A. Noriega, a defendant awaiting trial on federal criminal charges pending before the United States District Court for the Southern District of Florida, is currently detained at the Metropolitan Correction Center (MCC), Dade County, Florida. On November 6, 1990, applicants-petitioners, Cable News Network, Inc., and its parent corporation, Turner Broadcasting Systems, Inc. (collectively petitioners), notified Noriega's attorneys that they were in possession of seven tape recordings of telephone conversations that Noriega had while he was housed at the MCC.[1] Petitioners played a portion of one of those tapes for Noriega's lead counsel, who identified the conversation on the tape as one between Noriega and a legal assistant and interpreter in his office. Pet. App. 2a-3a, 30a-31a.

As a result of petitioners' disclosure, Noriega filed on November 7 an emergency motion for an injunction in the district court. Noriega sought an order "prohibiting [petitioners] from broadcasting any tape recording of any communication between General Manuel Antonio Noriega and any of his lawyers

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[1] The Bureau of Prisons, as a matter of prison security, routinely monitors the telephone conversations of all inmates and so informs all inmates. Conversations with attorneys are not monitored when the inmate notifies prison authorities that he wishes to speak privately. See Pet. App. 14a-15a, 77a-78a; see also *id.* at 141a-146a (release signed by Noriega).

The record contains no information regarding the origin of the tape recordings petitioners obtained.

or his staff." Pet. App. 32a.[2] The district court held a hearing the next day, November 8. Pet. App. 71a-100a.

2. a. At the conclusion of the hearing, at which counsel for petitioners, Noriega, and the government entered appearances, the district court entered an order temporarily enjoining petitioners from publishing any of the tapes that contained privileged attorney-client communications. The court's order did not apply to conversations that did not contain such privileged communications. Pet. App. 83a, 86a; see *id.* at 25a.[3]

b. Later that day, the district court entered a written memorandum order and decision explaining its temporary injunction. Pet. App. 19a-24a. At the outset, the court noted that

> the issue it confronts is unprecedented. The court is aware of no case, and none has been presented to it, in which a member of the press sought to broadcast an otherwise privileged attorney-client communication.

Id. at 19a. As the court viewed the issue, the case presented "a conflict between Noriega's right to a

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[2] Noriega's motion emphasized that "the objection made is not to [petitioners'] right to broadcast a story, but specifically their right to play a particular attorney/client privileged communication." Pet. App. 31a.

[3] The court had also directed petitioners to produce the tapes for in camera review, but stayed that portion of its order. See Pet. App. 87a, 94a-97a.

During the hearing, the court directed the government to refrain from monitoring "further conversations between the lawyers, their representatives and [Noriega]." Pet. App. 86a. The court also received from the government "under seal a list of the telephone calls [Noriega made from the MCC]." *Id.* at 94a.

fair trial and the First Amendment prohibition against prior restraints." *Id.* at 21a. The court recognized the gravity of prior restraints: "The right of the press to be free of prior restraints on speech is, of course, at the very core of the First Amendment." *Ibid.* For that reason, the court observed, "[a] prior restraint is presumptively unconstitutional." *Ibid.* (citing *Organization for a Better Austin* v. *Keefe*, 402 U.S. 415, 419 (1971)).

The court acknowledged that Noriega "bears a heavy burden to prove that a prior restraint is justified, and that a prior restraint can issue only where the danger of disclosure is clear, immediate, and irreparable." Pet. App. 22a. Following this Court's decision in *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 562-568 (1976), the court explained that "the determination of when prior restraint is justified where it conflicts with the right of fair trial must rest upon factual findings based on the contents of the speech at issue." Pet. App. 23a. Specifically, the court stated that its task under *Nebraska Press Ass'n* would be to determine "whether the nature and content of the disclosure [of alleged defense and confidential trial strategy] would impair the right to a fair trial, whether any less drastic means * * * would mitigate the effects of the disclosure, and whether a prior restraint would effectively prevent the harm." *Ibid.* Here, the court pointed out, "the contents of [petitioners'] tapes are not before the court, and therefore it is impossible to determine, at this stage, the precise extent to which Noriega's right to a fair trial would be hampered by disclosure." *Ibid.*[4]

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[4] In these circumstances, and based on Noriega's allegations and petitioners' concessions, see Pet. App. 20a, the district court assumed that "at least some of the tapes contain discus-

Accordingly, the court ordered that "the temporary injunction imposed on [petitioners] * * * is continued until such time as [a designated United States magistrate reviews the tapes] * * * [to] determine whether anything contained in the recordings presents a clear, immediate, and irreparable danger to [Noriega's] right to a fair trial." Pet. App. 23a. The court directed petitioners to provide copies of the tapes to the magistrate for that purpose. *Id.* at 23a-24a.

c. Petitioners did not comply with the district court's directive. Instead, petitioners on November 8 noted an appeal from the district court's order temporarily enjoining publication of the tapes, Pet. App. 37a-40a, and filed an emergency motion in the court of appeals for "immediate consideration and vacation of [that] order," *id.* at 41a.

3. a. On November 9, the district court entered a supplemental order in which it further explained the basis for the temporary relief it had entered the day

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sions of witnesses, evidence, and certain other aspects of Noriega's defense," *id.* at 23a. This the court viewed as implicating constitutional concerns with respect to the attorney-client privilege in the context of a criminal case, since the privilege "serves to protect a criminal defendant's Sixth Amendment right to effective assistance of counsel by ensuring unimpeded communication[s] and disclosure by the defendant to his attorney." *Id.* at 20a. The existence of the tape recordings had, in the court's view, already frustrated that underlying purpose of the privilege. No broadcast restraint would, in the court's analysis, be justified on that ground alone for it would merely be "symbolic and prophylactic as far as this aspect of the attorney-client privilege is concerned." *Id.* at 21a. The court's concern was therefore focused on the injury flowing from dissemination of the defense's theory of the case and its trial strategy. "In this sense, the issue is really one of the right to a fair trial rather than the attorney-client privilege per se." *Ibid.*

before. Pet. App. 25a-29a. The court reiterated that the

> test for determining whether a prior restraint can issue where the right to a fair trial is at stake requires conclusions as to 1) whether the right to a fair trial would be impaired, 2) whether less restrictive alternative measures short of prior restraint are sufficient, and 3) whether a prior restraint would effectively prevent the harm.

Id. at 26a (citing *Nebraska Press Ass'n*, 427 U.S. at 562-568).

That test, the court pointed out, requires a factual inquiry. Yet because the contents of the tapes were not before the district court, the court "was in effect being asked to make a factual determination without being allowed to review the facts." Pet. App. 26a. Noting that petitioners have the tapes but have resisted turning them over to the court for review, the court remarked that it

> seems fundamentally unfair to allow [petitioners] to benefit from [their] refusal to disclose the contents of the tapes to the court—that is, to allow [petitioners] to argue that no prior restraint should issue because no clear and immediate harm is apparent when the only reason that no clear and immediate harm yet appears is because [petitioners have] so far prevented this court from reviewing the content of the tapes in [their] possession.

Ibid.

Turning to petitioners' contention that the court should look to the government to produce the tapes, the court explained that obtaining all the tapes in the government's possession would not identify the ones

in petitioners' possession, and might not even include all the tapes petitioners have. Pet. App. 26a-27a & n.1. This case, the court stated, is different from other prior restraint cases because here it is impossible for the court to make a determination whether publication would clearly and immediately harm the competing right at stake "without knowing the precise contents of the speech sought to be restrained." *Id.* at 28a. The court specifically contemplated an "expedited review" of the tapes in question before the magistrate and emphasized that its order "was not a decision on the merits of [Noriega's] request for injunction." *Id.* at 27a. The court therefore ordered that the temporary restraining order remain in effect for the period necessary for the magistrate to review the tapes, not to exceed ten days. *Id.* at 28a-29a.

b. Petitioners on November 9 promptly noted another appeal from the district court's supplemental order temporarily enjoining publication of the tapes, Pet. App. 44a-45a, filed another emergency motion in the court of appeals for "immediate consideration and vacation of [that] order," *id.* at 46a, and sought a stay of the district court's order pending appeal, *id.* at 49a-53a.[5]

4. On November 10, the court of appeals—treating petitioners' appeals from the district court's written orders prohibiting publication as a petition for a writ of mandamus—denied relief. Pet. App. 1a-17a.[6]

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[5] The court of appeals consolidated petitioners' separate appeals from the district court orders and directed the government and Noriega to file briefs on the issues presented. Pet. 8; Appl. 7.

[6] Petitioners do not appear to challenge the court of appeals' characterization of their case. See Pet. 4 & n.4. The

The court of appeals acknowledged that this case "presents a difficult question regarding the District Court's responsibility to balance the Sixth Amendment right to a fair trial of [Noriega], with [petitioners'] First Amendment right to be free from prior restraints against the broadcasting of newsworthy information." *Id.* at 2a. And in discharging that responsibility, the court stated, "the trial court is accorded broad discretion to accomplish its primary responsibility of ensuring that the accused has a fair trial." *Id.* at 7a.

The court of appeals recognized that "[n]otwithstanding the District Court's broad discretion in determining First Amendment interests with respect to a criminal defendant's Sixth Amendment right to a fair trial, a general, conclusory representation that publicity might deprive a defendant's right to a fair trial is insufficient." Pet. App. 10a (citing *Press-Enterprise Co.* v. *Superior Court*, 478 U.S. 1 (1986)). To the contrary, the district court's determination "must be definitively and explicitly stated based on

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court of appeals also held, as a threshold matter, that it lacked jurisdiction over petitioners' appeal from the district court's initial oral order, and accordingly dismissed that appeal. Pet. App. 3a & n.1; *id.* at 18a. Petitioners have not sought further review of that aspect of the court of appeals' judgment.

On the evening of November 9, petitioners aired a news report that included the tape initially disclosed to Noriega's lead counsel. Pet. 7; Pet. App. 54a-55a. As a result, on November 10, Noriega filed a motion with the district court to hold petitioners in contempt. Pet. App. 102a-107a. Petitioners promptly filed in the court of appeals another emergency motion to enjoin the district court from holding a contempt hearing. The court of appeals denied that motion. *Id.* at 3a, 17a. Petitioners have not sought further review of that motion. See also note 8, *infra*.

the particular facts and circumstances of this case." Pet. App. 12a.

The court of appeals thus held that "it is essential that the District Court delineate carefully its reasons for proscribing the broadcasting of the tapes in question, * * * [and that] [p]articular attention should be given to the Sixth Amendment concern for an impartial jury." Pet. App. 12a. Accordingly, the court, noting its concern with petitioners' "refusal to obey the * * * order to release the tapes in question to the court," concluded that the district court "must possess the subject tapes in order to make its *in camera* determination of whether the attorney-client communications are privileged." *Ibid.*[7]

In sum, the court of appeals concluded that

> the First Amendment interests of the press and the public will be best served by immediate production of the tapes held by [petitioners] so that the District Court can conduct the difficult balancing of constitutional rights required under these circumstances; an obligation which the District Court is required to discharge.

Pet. App. 16a. In the present circumstances, the court determined, it is "required to speculate as a result of [petitioners'] refusal to produce the tape recordings." *Ibid.* As the court observed in closing, "[n]o litigant can continue to violate a district court's or-

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[7] In that regard, the court of appeals also concluded that

> [w]hether or not the telephonic communications between Noriega and his defense counsel are privileged, while not necessarily determinative of whether such communications should be publically broadcast, would be relevant to the District Court's assessment of potential harm to Noriega's right to a fair trial.

Pet. App. 15a-16a.

der and attempt to have that district court's order reviewed at the same time." *Ibid.*

5. On November 15, after further proceedings in the district court,[8] petitioners filed this application for a stay of the district court's orders (No. A-370), together with their petition for a writ of certiorari (No. 90-767).

ARGUMENT

Despite the broadside attack on the district court's orders leveled by petitioners (Appl. 10-32; Pet. 8-31) and their amici (New York Times Br. 8-18; American Society of Newspaper Editors Br. 1-20), this case does not require the Court to address the broad question whether an injunction against publication is justified on the basis of the record made to date. The district court has not permanently enjoined petitioners' publication of the Noriega tapes. To the contrary, the district court carefully crafted its orders for the limited and specific purpose of providing the court a brief period within which to carry out its "expedited review," Pet. App. 27a, to make promptly the factual

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[8] On November 12, after the court of appeals' decision, the district court held a hearing on Noriega's outstanding motion for civil contempt against petitioners. Pet. App. 108a-140a. At that hearing, petitioners advised the district court that they had "no intention to telecast any attorney-client privilege conversations until [they] get relief from the Supreme Court." *Id.* at 111a. Moreover, petitioners and Noriega, with the district court's approval, agreed at that time to abide by the district court's temporary injunction barring publication of the tapes and the stay of the district court's order directing petitioners to produce the tapes for in camera review (see note 3, *supra*), pending this Court's disposition of petitioners' application for a stay and petition for a writ of certiorari. See *id.* at 124a, 138a; Pet. Supp. App. 17-21. In light of these developments, the district court has taken no further action on Noriega's pending contempt motion against petitioners.

findings that this Court has indicated are necessary predicates for a restraint on publication in a case in which fair trial rights are at issue. *E.g.*, *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 562-568 (1976). In other words, the question presented here is quite narrow—whether the First Amendment prohibited the district court from temporarily barring petitioners from publishing tape recordings of conversations between Noriega and his attorneys, before submission of those tape recordings for an in camera review, in order to enable the court to make the factual findings necessary to determine whether a prior restraint on publication is permissible.

In our view, the district court's orders—entered solely for the purpose of enabling an informed decision to be made under the First Amendment on the merits of Noriega's request for an injunction against publication—are not foreclosed by that same constitutional provision. Rather, as the four judges now to have considered the issue properly recognized, the clash between the First Amendment guarantee of a free press and the constitutional guarantees of fair criminal proceedings may be accommodated by temporarily preserving the status quo in order to allow the courts an opportunity to assess and balance the relevant interests at stake. Only then can the courts be certain that the significant constitutional interests on both sides of the balance are weighted appropriately.

In light of the sound and limited rulings of the courts below, the application for a stay and the petition for a writ of certiorari should be denied.

1. The narrow question presented is whether the First Amendment prohibited the district court from temporarily barring petitioners from publishing tape recordings of conversations between Noriega and his

attorneys, before submission of those tape recordings for an in camera review, in order to enable the court to make the factual findings necessary to determine whether a prior restraint on publication is permissible. As they did in the courts below, petitioners continue to hold fast (Appl. 11-27; Pet. 12-24) to a position that contains an inherent contradiction: petitioners refuse to produce the tapes to the district court so that the court can make the factual findings necessary to determine whether an injunction is justified; at the same time, petitioners contend that the district court may not enjoin publication without first making those findings.

Petitioners' position can be sustained only if this Court were prepared to conclude that injunctive relief could never be justified in this case, regardless of the contents of the tapes petitioners have and intend to publish. Petitioners submit that the First Amendment licenses their refusal to provide the district court with the means to assess the potential harm that publication of the tapes could cause. In other words, petitioners assert that, even if the contents of the tapes made it inescapably clear that publication would render it impossible to ensure Noriega—and the public—a fair trial,[9] the First Amendment would still preclude injunctive relief.

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[9] The specific kind and degree of the harm that may result from broadcasting the tapes depends almost entirely on the contents of the tapes that petitioners possess and intend to broadcast. The government cannot now be more specific with respect to the possible harm that could flow from publication of the tapes, because the government, like the courts below, does not know the contents of the material petitioners have and intend to publish.

Petitioners try to whipsaw the rationale of the courts below by treating as straw men the asserted interests in preserving

This Court's decisions do not sanction such an extreme vision of the First Amendment. The Court has long recognized that "the entry of a prior restraint on publication * * * [is] one of the most extraordinary remedies known to our jurisprudence." *Nebraska Press Ass'n*, 427 U.S. at 562; see, *e.g.*, *Near* v. *Minnesota*, 283 U.S. 697 (1931). Nonetheless, as made plain in *Nebraska Press Ass'n*, "[t]his Court has frequently denied that First Amendment rights are absolute and has consistently rejected the proposition that a prior restraint can never be employed." 427 U.S. at 570; see, *e.g.*, *New York Times Co.* v. *United States*, 403 U.S. 713, 714 (1971); *Organization for a Better Austin* v. *Keefe*, 402 U.S. at 419-420; see also *Seattle Times Co.* v. *Rhinehart*, 467 U.S. 20, 32 (1984). Just last Term this Court reiterated that " '[p]rior restraints are not unconstitutional *per se* * * *.' " *FW/PBS, Inc.* v. *City of Dallas*, 110 S. Ct. 596, 604 (1990) (opinion of O'Connor, J.) (quoting *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 558 (1975)).

Given the daunting remedy of a prior restraint, and the need to accommodate the right to a free press guaranteed by the First Amendment with other equally weighty constitutional interests,[10] this Court

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privileged communications and avoiding prejudicial pretrial publicity. See Appl. 17-27; Pet. 20-23. But that tactic does not obscure the fact that *if* the tapes contain highly prejudicial material or reveal defense strategy in some significant way, publication of those tapes could have a direct, adverse effect on the prospects for a fair trial. Petitioners' position is that the district court is not even permitted to find out if that is the case.

[10] As this Court has pointed out, for example, "[t]he authors of the Bill of Rights did not undertake to assign priori-

has recognized that the critical question is "whether the entry of * * * an order [restraining publication] on *the showing* made before the * * * court violated the constitutional guarantee of freedom of the press." *Nebraska Press Ass'n*, 427 U.S. at 541 (emphasis added); see *id.* at 562 ("whether the record supports the entry of a prior restraint on publication"). In other words, the searching constitutional inquiry this Court has demanded—focusing on the impairment of otherwise protected constitutional rights, the availability of alternative measures short of a prior restraint, and the effectiveness of the restraint, see *id.* at 562-568—requires (and presupposes) an adequate record from which the court can reasonably determine whether the particular case falls within the narrow category of cases in which a prior restraint is permissible. Indeed, in the *Nebraska Press Ass'n* case, the Court struck down an injunction against publication of information about a criminal defendant only after concluding that the probability of prejudice to the defendant's right to a fair trial "was not demonstrated with the degree of certainty our cases on prior restraint require." 427 U.S. at 569.

In light of these settled principles, the district court properly entered orders necessary to maintain the status quo pending the court's findings as to the nature of the tape recordings at issue. Without such temporary restraining orders, petitioners presumably would have published the tape recordings, which in turn would have rendered the request for injunctive relief moot. Although this Court has emphasized that a "prior restraint[] * * * bear[s] a heavy presump-

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ties as between [the] First Amendment and Sixth Amendment rights, ranking one as superior to the other." *Nebraska Press Ass'n*, 427 U.S. at 561.

tion against its constitutional validity," *New York Times Co.* v. *United States*, 403 U.S. at 714 (internal quotation marks and citations omitted), the Court has never held that a federal court may not ever exercise its authority to maintain the status quo *pending a determination whether a prior restraint is appropriate in a particular case.* To the contrary, this Court entered just such an order in the *Pentagon Papers* cases. See *New York Times Co.* v. *United States*, 403 U.S. 942 (1971); *United States* v. *Washington Post Co.*, 403 U.S. 943 (1971).[11]

Here, petitioners' request for emergency relief, although styled as an application for a stay pending the disposition of certiorari, at bottom seeks from this Court the functional equivalent of summary disposition of their claim on the merits, namely, that the First Amendment prohibited the district court from temporarily barring publication in order to enable the court to make the factual findings necessary to determine whether a prior restraint is permissible. If the district court's orders were stayed by this Court, petitioners would be free to publish the tape recordings and, in so doing, would render the controversy effectively moot. As shown above, this Court's decisions do not countenance such an inflexible and counterintuitive approach to the First Amendment. Moreover, in the past, this Court has not hesitated to preserve the status quo in analogous

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[11] Indeed, in the *Nebraska Press Ass'n* case, Justice Blackmun, sitting as Circuit Justice, denied an application for a stay to lift the state court's restraining order that essentially maintained the status quo pending further proceedings. See *Nebraska Press Ass'n* v. *Stuart*, 423 U.S. 1319, 1332-1333 (1975) (in chambers). And this Court later denied petitioners' application for a more extensive stay in that case. *Id.* at 1027.

cases in order to ensure an orderly and effective means of judicial review. *E.g.*, *Nebraska Press Ass'n* v. *Stuart*, 423 U.S. 1027 (1975); cf. *FW/PBS, Inc.*, 110 S. Ct. at 612 (Brennan, J., concurring in the judgment) (in licensing context, "any prior restraint in advance of a final judicial determination on the merits must be no longer than that necessary to preserve the status quo pending judicial resolution").

The critical point is that the First Amendment is part of the rule of law, not above it. It is certainly true that, under the First Amendment, a lasting prior restraint on publication may be justified only in the most extraordinary circumstances. But the rule of law requires permitting a court to determine if those circumstances exist. This may or may not be the rare case in which a lasting prior restraint is justified. The district court entered the challenged orders to find out. And those orders were expressly intended to be temporary in duration so the district court could promptly carry out its process of "expedited review." This, then, is a far cry from the situations that obtained in this Court's "prior restraint" cases. Accordingly, petitioners' application for a stay of the district court's orders should be denied.

2. The narrow issue actually presented by the petition for certiorari—whether the First Amendment prohibited the district court from temporarily barring publication in order to enable the court to make the factual findings necessary to determine whether a prior restraint is permissible—does not now warrant this Court's review. As explained above, the approach adopted by the district court and court of appeals for addressing Noriega's request for an extraordinary prior restraint on publication is both sensible and consistent with this Court's decisions.

And contrary to petitioners' sweeping submission (see, *e.g.*, Pet. 26-31), the decision below is not at odds with a host of other lower court decisions. In each of those decisions, the court had before it an adequate record—including at least a sufficient description of the material sought to be published—to undertake the requisite constitutional inquiry. See, *e.g.*, *CBS* v. *United States District Court*, 729 F.2d 1174 (9th Cir. 1983) (government surveillance tapes of criminal defendant); *Goldblum* v. *NBC*, 584 F.2d 904 (9th Cir. 1978) (Kennedy, J.) ("docudrama" film about convicted defendant's well-publicized fraud scheme).[12] Here, by contrast—in light of the peculiar circumstances presented by petitioners' having tape recordings whose contents are unknown—the courts below had no such record with which to make the appropriate inquiry. Nothing in the First Amendment, this Court's decisions, or the decisions of lower federal and state courts, requires the difficult issues surrounding a motion for an injunction barring publication to be resolved in such a manner.[13]

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[12] The fact that, in cases such as *CBS* and *Goldblum*, the courts did not have access to the tapes and film in question is irrelevant, since the courts otherwise had sufficient information to assess the significance of the materials at issue.

[13] Petitioners assert in passing (Pet. 25) that the district court's restraining orders are unconstitutionally vague. The record belies that suggestion, where petitioners themselves have told the district court that they fully understand the scope of those orders, *i.e.*, that they would not "telecast any attorney-client privilege conversations" pending disposition of the case before this Court. Pet. App. 111a. Indeed, on November 13, petitioners reiterated before the district court that they understood that they "are under a Court Order restraining us from telecasting any privileged attorney-client communications between Mr. Noriega, General Noriega and his lawyers." Pet. Supp. App. 17.

In the end, petitioners and amici trumpet that this case poses a conflict between free press and fair trial. And they have no doubt as to how that conflict should be resolved. But the purpose of the narrow orders entered by the district court was not to protect the parties' right to a fair trial, it was rather to determine the extent to which that right was threatened and, if so, what steps—if any—were necessary and appropriate to protect it. There will be time enough for the lower courts and this Court to consider whether a lasting prior restraint over publication of privileged attorney-client communications is permissible to ensure a fair trial, when we know whether petitioners' tapes contain such communications, and whether—given their contents—such an injunction would be the only effective alternative. We do not yet know that. Review by this Court is thus, at the least, premature.

In short, petitioners ask this Court to resolve the questions they present in a vacuum. Their request is all the more remarkable for its sweep. In their view, this Court should now hold that the First Amendment right to publish prevails *no matter what* might be on the tapes and *no matter what* the effect of publication might be. Petitioners make generous use of the term "unprecedented," see, *e.g.*, Pet. 8, but it is, upon close scrutiny, the ruling they seek from this Court—that a federal court cannot even ask what it is that will be published in considering whether publication is protected—that would be truly unprecedented. The Court should decline the rushed invitation to embrace that vision of the First Amendment.

CONCLUSION

The application for a stay of the district court's orders pending the disposition of the petition for a writ of certiorari and the petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1990

☆ U. S. GOVERNMENT PRINTING OFFICE: 1990 282061 20210

Supreme Court, U.S.
FILED
NOV 18 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 90-767
No. A-370

In the Supreme Court of the United States of America

October Term, 1990

CABLE NEWS NETWORK, INC., and
TURNER BROADCASTING SYSTEM, INC.,
Petitioners,

v.

MANUEL ANTONIO NORIEGA and
UNITED STATES OF AMERICA,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF IN FURTHER SUPPORT OF APPLICATION TO STAY DISTRICT COURT RESTRAINING ORDERS PENDING CERTIORARI AND IN FURTHER SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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From the briefs before this Court, it is now plain that the continuing prior restraint on CNN was issued without even the most minimal compliance with the showing required by *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976). The brief of Respondent Manuel Noriega himself — as well as that of the United States — highlights the wholesale failure of Noriega, as the moving party, to discharge his burden.

CNN repeatedly pointed out to the trial court the availability of alternatives to the imposition of the "most serious and the least tolerable infringement on First Amendment rights," a prior restraint, *Nebraska Press*, 427 U.S. at 559. Noriega offered no real reason to that court why those alternatives would not work, and he has offered none here. Thus, Noriega speculates (p. 20) that a change of venue "may not" work because of the spectre of nationwide publicity. But he offers no refutation of the consistent experience of courts around the country in high visibility cases, including the Watergate trials, the Iran-Contra trials, and the ABSCAM prosecutions, that even the most intense nationwide publicity can be dealt with. *See* cases collected in *In re Charlotte Observer*, 882 F.2d 850, 855-56 (4th Cir. 1989). Similarly, Noriega disparages the value of voir dire and instructions to the jury, speculating that disclosure of "trial strategy" "may well" prevent selection of an impartial jury. (Noriega Br. at 20) But it is hard to accept this as an answer at all when such potentially prejudicial information as confessions (*Nebraska Press*) and videotapes of alleged criminal acts themselves[1] have been dealt with by voir dire and instructions. Nor does Noriega even address why steps already taken by the prosecution team to insulate itself from learning the contents of the tapes in CNN's possession would not serve

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[1] *See Columbia Broadcasting Systems, Inc. v. U.S. District Court*, 729 F.2d 1174 (9th Cir. 1983) (vacation of restraint against broadcast of tapes showing alleged criminal acts by John DeLorean).

fully to protect him against whatever damage is said to flow from CNN's telecast of the tapes.[2]

Similarly, Noriega's own words demonstrate that the restraint he sought could not be expected to be effective in protecting him, as *Nebraska Press* also requires. 427 U.S. at 565. Noriega's counsel informed the District Court that copies of the audio tapes in question were in the possession of the Panamanian government, among others. App. 98a, 99a. Just two days ago, Noriega himself repeated that in a formal statement to the District Court: "They [the United States government] have taken my money, deprived me of my lawyers . . . wire taped my telephone calls with my lawyers and *even given them to the Endara[Panamanian] government* and to the press."[3] Letter from Defendant Noriega to Honorable William M. Hoeveler (emphasis added).[4] It is difficult to imagine how an order prohibiting CNN's broadcast would prove a "workable method of protecting" Noriega's rights (*Nebraska Press*, 427 U.S. at 565) when, as Noriega affirms, the tapes have been distributed to a foreign government hostile to him to which the orders of the District Court do not run.

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[2] The prosecution team has repeatedly stated that it has not had, and will not have, access to any information derived from tapes of attorney-client communications. App. 75a, 76a, 85a, 88a, and 89a. Indeed, at one hearing, the government offered different counsel to hear any attorney-client tapes expressly to avoid any taint of the actual prosecution team. App. 103a, 104a.

[3] The record reflects the understanding of all parties that the tapes in question are copies of conversations taped by the government at the Miami Correctional Center. App. 30a, 34a; Transcript of Nov. 8 & 9 Hearing at 99-100 (a complete copy of which has been lodged in the Clerk's office); Transcript of Nov. 13 Hearing at 8 (the sealed log of attorney-client recordings was maintained by the government). The statement in the Brief of the United States (p. 2, n.1) that the record is silent on this issue is, therefore, in error.

[4] A copy of the letter submitted to the District Court is submitted as a supplemental appendix attached to this brief.

It is plain that Noriega cannot satisfy this Court's *Nebraska* test. The only way the prior restraint imposed here could be sustained is if the position of the United States were adopted, a position which holds that Noriega did not have to satisfy *any* burden at all until the District Court was satisfied that it had before it a full factual record — and that CNN's unwillingness (rooted in First Amendment concerns)[5] to put the tapes before the Court itself provided a sufficient basis to impose a prior restraint.

At first glance, the government's position is not without appeal. Why should a court not have every bit of evidence before it prior to making a significant ruling? Why should it not preserve the status quo by barring publication until it is satisfied that it can decide, based on all the evidence it deems relevant, how best to enforce the rulings of this Court? The reality, however, is that prior restraints are not like other court orders. They are, unlike all others, "presumptively unconstitutional." *Nebraska Press*, 427 U.S. at 558-59. They are based on the notion that the status quo is the right to print, not an enforced standstill that bars publication.[6] They are rooted in the understanding that unless the party seeking the restraint can meet an almost insurmountably "heavy burden," the restraint will not issue. *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971).

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[5] *See Goldblum v. NBC*, 584 F.2d 904 (9th Cir. 1978); *In re CBS, Inc.*, 570 F. Supp. 578 (E.D. La. 1983). Throughout the brief of the United States, the assumption is made — without reference to authority and without argument devoted to the point — that CNN's concerns were frivolous. The gravity of such concerns, however, is recognized in the decisions cited above, which reject unnecessary orders to produce in aid of prior restraints.

[6] *See, In Re Providence Journal Co.*, 820 F.2d 1342, 1351 (1st Cir. 1986), *modified*, 820 F.2d 1354 (1st Cir. 1987) (*en banc*), *cert. dismissed*, 485 U.S. 693 (1988).

The government's argument comes down to little more than a proposed rule which would allow the initial issuance of a prior restraint *without satisfying any standards at all*. In effect, under this rule, the movant would be given an automatic pass from meeting any burden imposed by the First Amendment, let alone the extraordinary one imposed by the case law. There are, at the very least, serious flaws in this approach.

For one thing, this Court has already recognized that there is no lowered standard for a brief restraint to permit study of the materials at issue. As this Court's opinion in *Nebraska Press* noted:

> The Court's conclusion in *New York Times* suggests that the burden on the Government is not reduced by the temporary nature of a restraint; in that case the Government asked for a temporary restraint solely to permit it to study and assess the impact on national security of the lengthy documents at issue.

427 U.S. at 559. In the *New York Times* case, of course, the court ultimately disapproved the restraints in question.[7]

Second, the government's approach, like the District Court's approach below, treats the *Nebraska* test as though it had only one part and as if the inadequacy of the record to resolve any one aspect automatically requires — in that analy-

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[7] That this Court granted a stay in the *New York Times* case does not advance the government's position. In that case, the United States sought to restrain publication of material that it represented, under oath, to all courts from the day the case began would, if published, "pose a grave and immediate danger to the security of the United States." 403 U.S. 713, 741 (Marshall, J., concurring). On the basis of that and similar representations, in the context of two cases which had led to conflicting results in the circuits about the same documents and at a time when the legal tests for the issuance of prior restraints were less than wholly clear, this Court stayed the *New York Times* from publishing the materials in its possession. None of those factors is present here.

sis — that a restraint be issued until the record is complete. But here, and indeed in most cases, we submit, the Court can conclude that one or more parts of the *Nebraska Press* inquiry can be resolved against the restraint — and hence the request for the restraint rejected — without need of the fullest possible record.

Thus, the absence of the tapes in this case is no impediment at all to consideration of at least two of the *Nebraska Press* requirements — the availability of alternatives and the efficacy of the prior restraint. Noriega's complete failure to explain why sequestering the prosecution would not prevent its taint cannot be explained by a lack of knowledge as to precisely what information CNN has. Whatever that information is, the prosecution lawyers can be fully shielded from it; indeed, they state they have already shielded themselves. Nor does lack of information about which tapes CNN has justify Noriega's failure to explain why, notwithstanding the availability of voir dire and other jury selection techniques, the trial court cannot find twelve jurors in metropolitan Miami "who would, under proper instructions, fulfill their sworn duty." *Nebraska Press*, 427 U.S. at 569.

In a similar vein, Noriega cannot show that a ban on CNN's telecast of the tapes will effectively prevent their dissemination by the government of Panama, or others who may possess them. In short, it is not lack of knowledge about the tapes that has prevented Noriega from satisfying the *Nebraska Press* standard; it is a substantive inability to justify a restraint that dooms his case.[8] *Nebraska Press* made clear that a movant seeking the extraordinary relief of a prior restraint must

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[8] In footnote 12 of its brief (p. 18), citing *Goldblum v. NBC*, 584 F.2d 904 (9th Cir. 1978) and *In re CBS, Inc.*, 570 F. Supp. 578 (E.D. La. 1983), the United States appears to concede that where a court has sufficient information to otherwise determine the propriety of a prior restraint, requiring production of tapes or other source materi-

satisfy the most demanding standards to obtain any relief; Noriega could not and did not. On this basis and for this reason, the prior restraint should be set aside immediately.

As a final point, petitioners wish to make clear that they are *not* urging certain positions ascribed to them by respondents.

First, although many lower courts[9] and, indeed, several members of this Court, have questioned whether the *Nebraska Press* test can ever be satisfied, the Court need not reach that question to rule in CNN's favor here. The *Nebraska Press* standards simply were not met and cannot be met in this case. Indeed, this appears to be virtually uncontested.

Similarly, we do not contend that the material in CNN's possession may not be helpful in applying some element of those tests. We do contend, however, that the courts must hold a party seeking a prior restraint to its burden under *Nebraska Press*, and while a court may consider the disabilities the movant may labor under without such access,[10] the absence of such material does not substitute for the requisite showing, particularly when, as here, the record discloses that the *Nebraska* standards cannot be met.

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als is inappropriate. The government fails to recognize, however, that this is such a case.

[9] *See, e.g., Columbia Broadcasting System, Inc. v. United States District Court*, 729 F.2d 1174, 1178 & n.4 (9th Cir. 1983).

[10] It is, of course, true, however, that in most prior restraint cases the movant and the court will generally be "unable to predict the manner in which potentially prejudicial information would be published" or the "frequency" or "context", etc. (*Nebraska Press Association*, 427 U.S. at 599 (Brennan, J., concurring). In this as in so much else, the courts below erred in viewing the case before them as unique or unprecedented. The courts have dealt summarily with prior restraints on broadcasts without access to the planned broadcasts themselves (*see Goldblum v. NBC, supra*; *In re CBS, supra*). They have done so without the need for a new rule wholly eviscerating *Nebraska*. No such revision of that rule is required now.

Prior restraints frequently seem to offer an attractive way to avoid prejudicial pretrial publicity. They are, indeed, powerful medicine — so powerful, in fact, that they have been all but totally banned from being prescribed. As Attorney General Thornburgh recently advised members of the press: "You enjoy all but absolute protection against prior restraint, a right often — indeed, without present exception — upheld in the courts." *Legal Times*, Nov. 12, 1990, at 15.

To say this is not to quarrel with the proposition that "the First Amendment is part of the rule of law, not above it." (U.S. Br. at 16). It is simply to maintain that the First Amendment *is* law and that it should be enforced.

CONCLUSION

It is respectfully submitted that the prior restraint on CNN now in effect should be stayed and the petition for a writ of certiorari granted or, in the alternative, the petition should be granted and the case set for immediate hearing on the merits of the petition.

Dated November 18, 1990.

Respectfully submitted,

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No. 90-767
No. A-370

IN THE SUPREME COURT
OF THE UNITED STATES OF AMERICA

October Term, 1990

CABLE NEWS NETWORK, INC., and
TURNER BROADCASTING SYSTEM, INC.,
Petitioners,

v.

MANUEL ANTONIO NORIEGA and
UNITED STATES OF AMERICA,
Respondents.

**ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

SECOND SUPPLEMENTAL APPENDIX

November 16, 1990

Honorable William M. Hoeveler
United States District Court Judge
301 North Miami Avenue
Miami, FL

Dear Judge Hoeveler:

When I was brought to the United States, I mistakenly believed that I would be able to receive a fair trial. In order for this to come true, I also believed that I would be able to use my money to hire the lawyers of my choice. It is painfully obvious that the United States Government does not wish me to be able to defend myself and have done everything possible to deprive me of a fair trial and due process. They have taken my money, deprived me of my lawyers, video taped me in my cell, wire taped my telephone calls with my lawyers and even given them to the Endara Government and to the press.

I am a military man and I understand a good fight. I never expected a fair fight from the Government of the United States.

I never expected an equal fight, from the Government of the United States, but I also never expected to face a virtual army of prosecutors and investigators on such an uneven field of battle.

The United States Government wishes me to engage in combat in the courtroom with them, but my army is to consist of only three (3) unpaid soldiers whose loyalty is unquestionable, but are only allowed to be armed with hand guns and no support staff, while the prosecutor's office has nuclear weapons.

This they call a fair fight.

Obviously, it is to the benefit of the government that I cannot defend myself, for they fear what I know.

The battle I face ahead is very similar to when the United States invaded my country. That was one sided and unfair, and so is this battle.

The one shinning light through this legal nightmare has been Your Honor, Judge Hoeveler.

You have acted as honest and fair as any one could hope for.

You have done your very best to protect me and my rights from the overreaching and oppressive conduct of the Government.

You have ordered the Government to release my funds to pay my lawyers. It is not your fault that the Government went behind your back to deprive me of my chosen attorneys.

I realize that this case has implications to the highest levels of the United States Government, including the White House, and I also realize that many forces are at work beyond your honor's control.

I know you have done your best for me and I thank you.

I thank my lawyers for their diligence, hard work, and unending loyalty to me and this case. They have worked for 10 months with no remuneration, whatsoever, and for this, I will always be in their debt. I cannot and do not expect them to go on to the point of bankruptcy.

It pains me to know that I am being deprived of their services when the solution to the problem is so simple. When I was the leader of the Republic of Panama, the United States would ask many different things of me. They would ask me to arrest people, to allow the search of Panamanian flag vessels, to send people to the United States for trial and to freeze bank accounts. I know that when the United States seriously requests something of a foreign government, they get it.

The purported efforts of the United States Government to unfreeze certain of my funds to pay my lawyers and finance my defense was a sham. If the United States Government sincerely wanted those accounts unfrozen, they would have been unfrozen.

I am now at the mercy of a totally unfair and unjust system who chooses my prosecutors and now chooses my defense lawyers.

This is not justice, why should we pretend it is.

Yours truly,

General Manuel Antonio Noriega

No. 90-767
No. A-370

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF IN FURTHER SUPPORT OF APPLICATION TO STAY DISTRICT COURT RESTRAINING ORDERS PENDING CERTIORARI

CERTIFICATE OF SERVICE

I. P. Cameron DeVore, a member of the Bar of this Court, hereby certify that on this 18th day of November, 1990, three copies of the Reply Brief in Further Support of Application to Stay District Court Restraining Orders Pending Certiorari were served by courier upon Frank, A. Rubino, Esq., 2601 S. Bayshore Drive, Suite 1400, Coconut Grove, FL 33133, counsel for the respondent Noriega herein, and upon Dexter W. Lehtinen, Esq., United States Attorney, and Myles Malman, Esq., Assistant United States Attorney, 155 S. Miami Avenue, Miami, FL 33130, counsel for the respondent United States of

America, herein, and were served by hand upon the Solicitor General, Department of Justice, Washington, D.C. 20530. I further certify that all parties required to be served have been served.

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Supreme Court, U.S.
FILED
NOV 15
JOSEPH F. SPANIOL, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

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—against—

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and

UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF *AMICI CURIAE* OF THE NEW YORK TIMES COMPANY, DOW JONES & COMPANY, INC., GANNETT CO., INC., KNIGHT-RIDDER, INC., THE MIAMI HERALD PUBLISHING COMPANY, THE TIME INC. MAGAZINE COMPANY, THE TIMES MIRROR COMPANY, TRIBUNE COMPANY, THE WASHINGTON POST COMPANY AND THE AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION, INC. IN SUPPORT OF THE PETITIONERS

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IN THE

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OCTOBER TERM, 1990

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BRIEF *AMICI CURIAE* OF THE NEW YORK TIMES COMPANY, DOW JONES & COMPANY, INC., GANNETT CO., INC., KNIGHT-RIDDER, INC., THE MIAMI HERALD PUBLISHING COMPANY, THE TIME INC. MAGAZINE COMPANY, THE TIMES MIRROR COMPANY, TRIBUNE COMPANY, THE WASHINGTON POST COMPANY AND THE AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION, INC. IN SUPPORT OF THE PETITIONERS

This brief is submitted on behalf of The New York Times Company, Dow Jones & Company, Inc., Gannett Co., Inc.,

Knight-Ridder, Inc., The Miami Herald Publishing Company, The Time Inc. Magazine Company, The Times Mirror Company, Tribune Company, The Washington Post Company, and the American Newspaper Publishers Association, Inc., as *amici curiae*.

INTERESTS OF *AMICI CURIAE*

Pursuant to Rule 37.2 of the Rules of this Court, *amici* have obtained and file herewith the written consent of all parties to this action to the submission of this brief.

Amici are major publishing companies and an association of newspaper publishers. The New York Times Company publishes *The New York Times*, a daily newspaper with a national circulation of 1.15 million daily and over 1.7 million on Sunday. The Company also owns five television stations, two radio stations, 32 regional newspapers and 17 national magazines.

Dow Jones & Company, Inc. publishes, *inter alia*, *The Wall Street Journal*, the largest circulation daily newspaper in the country, as well as *Barron's National Business and Financial Weekly*, the Dow Jones News Services and, through its Ottaway Newspapers, Inc. subsidiary, newspapers in 29 communities in 13 states.

Gannett Co., Inc. is a nationwide news and information company that publishes 82 daily newspapers (including *USA Today*), a variety of non-daily publications (including *USA Weekend*, a newspaper magazine) and operates 10 television stations, 15 radio stations, Gannett News Services and the largest outdoor advertising company in North America.

Knight-Ridder, Inc. is an international information and communications company engaged in newspaper publishing, business news and information services, news, graphics and photo services, cable television and newsprint manufacturing. The Miami Herald Publishing Company is a division of Knight-Ridder, Inc. It publishes *The Miami Herald* and *El*

Nuevo Herald, which are circulated generally throughout the State of Florida. Knight-Ridder also publishes 28 other daily newspapers including *The Philadelphia Inquirer*, the *San Jose Mercury News* and the *Detroit Free Press*.

The Time Inc. Magazine Company is the largest publisher of general circulation magazines in the United States. Among the magazines it publishes are *Time*, *Fortune*, *Sports Illustrated*, *People*, *Money* and *Life*. (The Time Inc. Magazine Company is a wholly owned subsidiary of Time Warner Inc., which directly or indirectly owns approximately 18% of Turner Broadcasting System, Inc.)

The Times Mirror Company is a diversified communications company with cable, broadcasting, publishing, and newspaper properties, including the *Los Angeles Times*, *Newsday* and *New York Newsday*, the *Baltimore Sun*, the *Hartford Courant*, and the *Morning Call* of Allentown, Pennsylvania.

Tribune Company is the nation's fifth largest newspaper publisher and its fourth largest television broadcaster. The company's daily newspapers include *Chicago Tribune*, the New York *Daily News*, *The Orlando Sentinel*, the Fort Lauderdale *Sun-Sentinel*, the *Daily Press* and *The Times-Herald* of Newport News, Virginia, and the *Times Tribune* of Palo Alto and *Times Advocate* of Escondido, California. The six Tribune television stations are WPIX in New York, KTLA in Los Angeles, WGN-TV in Chicago, WGNX in Atlanta, KWGN in Denver and WGNO in New Orleans.

The Washington Post Company is a diversified communications company which owns, *inter alia*, *The Washington Post*, a newspaper published in the Washington, D.C. area with a daily circulation of 885,000 and a Sunday circulation of 1,189,000 and *Newsweek* magazine, a weekly international newsmagazine with a United States readership in excess of 19 million.

The American Newspaper Publishers Association (ANPA) is a national trade association representing about 1,400 news-

papers throughout the United States. ANPA membership constitutes approximately 90% of the total daily and Sunday newspaper circulation, and a substantial portion of the non-daily newspaper circulation, in the United States.

Amici share a common interest in preserving and exercising their First Amendment rights and a common concern that the decision of the Court of Appeals below would imperil those rights. *Amici* believe that the ruling of the Court of Appeals in this case, together with a spate of recent decisions in the lower courts, have disturbed the heretofore uniform recognition that *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539 (1976), stands as an all but absolute bar to prior restraints on publication. *Amici* have particular concern flowing from the decisions below that failure to insist on application of the *Nebraska Press* standards may lead to relatively routine use of prior restraints as an "easy" way of responding to perceived threats to fair trial rights.

The Petition raises important issues of law under the First Amendment with respect to the circumstances under which a publisher or broadcaster may be enjoined even temporarily from publishing newsworthy information. This is an issue of critical significance to *amici*, as they routinely operate under severe deadline pressures and strive to publish or broadcast news in a timely fashion.

STATEMENT OF THE CASE

Amici adopt the Statement of the Case set forth in the Petition and set forth below only the facts and procedural history which bear upon the Reasons for Granting the Writ submitted by *amici*.

This case concerns audiotapes of conversations between General Manuel A. Noriega, the former Panamanian leader and a criminal defendant incarcerated in federal prison, and various individuals, including persons asserted to be employed by General Noriega's counsel. Audiotapes of telephone conversations by prisoners are routinely prepared by

the United States Bureau of Prisons. Prisoners are informed of such taping. The team of prosecutors involved in the underlying criminal case denies involvement in the taping of General Noriega and knowledge of the contents of the audiotapes.

Petitioners ("CNN") obtained copies of a number of audiotapes of General Noriega made while he was incarcerated. CNN sought the views of representatives of the United States, the defense, and academic legal experts as to the propriety of such taping. General Noriega's counsel reviewed the tapes and appeared in an on-camera interview to discuss them. After CNN had broadcast that interview, along with a portion of one of the audiotapes, General Noriega's counsel moved to restrain further broadcasts.

Noriega's motion was heard on November 8, 1990 in the United States District Court for the Southern District of Florida, where the criminal case was pending. At the conclusion of that hearing, the District Court issued an order enjoining CNN from broadcasting the tapes containing privileged attorney-client conversations pending their review by the court and ordering CNN to produce copies of the tapes. The District Court, after acknowledging that the test set out in *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539 (1976), was controlling, concluded that application of the test was "impossible" pending review (by a magistrate) of the tapes. Appendix to the Petition ("App.") 22a. In a supplemental order issued the next day, after CNN had declined to produce its tapes, the District Court again noted the asserted impossibility of applying the *Nebraska Press* test without reviewing the tapes: "the court was in effect being asked to make a factual determination without being allowed to review the facts." App. 25a. The court viewed it as "fundamentally unfair to allow CNN to benefit from its refusal to disclose the contents of the tapes to the court" and, while acknowledging that "no clear and immediate harm is apparent," the court dismissed the significance of this because CNN "had prevented [the] court" from reviewing the tapes. *Id.*

CNN filed a notice of appeal and emergency motions for reversal and stay with the United States Court of Appeals for the Eleventh Circuit on November 8, 1990. Supplemental briefs were filed by CNN the next day and the Court of Appeals then directed General Noriega and the United States to file briefs.[1] On November 10, 1990 the Court of Appeals, treating CNN's emergency motion as a petition for a writ of mandamus, denied the petition. The appeals court adverted to *Nebraska Press* only in passing, and to the larger body of law established by this Court all but totally barring prior restraints not at all. The court looked instead to cases involving press access to trial proceedings, including *Press-Enterprise Co.* v. *Superior Court*, 478 U.S. 1 (1986). These cases do not involve prior restraints on publication of materials already in the possession of the press, but instead deal with the quite different questions involved in determining whether the press may be denied access to proceedings and documents. The court also placed considerable emphasis on the potentially privileged nature of the taped Noriega conversations without explaining the significance of the privilege to the prior restraint issue (as opposed to possible governmental misconduct). App. 13a-15a. The Court of Appeals, like the District Court, did not determine that the prerequisites to *Nebraska Press* had been satisfied. The appeals court concluded that the District Court could "conduct the difficult balancing of constitutional rights" involved here only after review of the tapes. App. 16a.

CNN then filed with this Court its Petition for Certiorari and its emergency motion for a stay.

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1 After initial briefs were filed, and well in advance of any ruling by the Eleventh Circuit, CNN broadcast a second report including a tape of a Noriega conversation. While defendant initially moved to hold CNN in contempt, that motion has now been stayed by defendant, with the court's consent, pending this Court's review, and CNN has agreed not to broadcast any additional tapes containing attorney-client material pending this Court's consideration of this matter. (Transcript of Proceedings, Nov. 12, 1990)

SUMMARY OF ARGUMENT

Not once in its history has this Court affirmed the issuance of a prior restraint on the publication or broadcast of news. Not once—until this case—since this Court's decision in *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539 (1976), has any federal appellate court affirmed the issuance of a prior restraint on the publication or broadcast of news on any ground, let alone for fear that such publication or broadcast might imperil a criminal defendant's right to a fair trial. The very uniformity of the judgments in such matters bore out the correctness of this Court's observation that the record before it in *Nebraska Press* (one that led it to strike down the prior restraint in that case) was "illustrative rather than exceptional" and that the Court's action reflected the "heavy burden of demonstrating, in advance of trial, that without prior restraint a fair trial will be denied." 427 U.S. at 569. Indeed, the pattern reflecting a "recurring result . . . in case after case" following this Court's decision in *Nebraska Press* was the very sort that Justice White predicted might eventually suggest the adoption of a "more general rule" flatly barring prior restraints on this ground. *Nebraska Press*, *supra*, 427 U.S. at 570-71 (White, J., concurring).

Within the past year, however, the pattern of near-uniform judicial rejection of prior restraints has been broken by a series of lower court decisions imposing prior restraints. The present case, the only one of the group to survive intermediate appellate review, is in many respects reflective of the route by which prior restraints have been justified in the face of this Court's holding in *Nebraska Press*. The opinions below simply do not explain why the threat to General Noriega's rights can possibly be viewed as any more severe than those dealt with successfully in scores of other high visibility cases, including some in which reams of immunized testimony had to be kept from tainting prosecutors and the jury, or why the protective procedures endorsed in such cases would not suffice here. Such showings are required by this Court's decision in *Nebraska Press*. The result reached below

was, quite clearly, wrong; more importantly, however, unless reviewed by this Court, it threatens to make the prior restraint once again an acceptable judicial tool, to be used too easily by trial judges "to ease their task of ensuring fair proceedings and to insulate their conduct in the criminal proceeding from reversal." 427 U.S. at 608 (Brennan, J., concurring). But the First Amendment stands as a bar to this judicial short-cut.

It is submitted that sufficient experience in the application of *Nebraska Press* now exists to consider the "general rule" adverted to but not then endorsed by Justice White (*see also* Stevens, J., concurring in *Nebraska Press*, 427 U.S. at 617). The adoption of such a rule would avoid the necessarily hurried consideration of issues of constitutional moment inherent in evaluations of a prior restraint, consideration which ought to lead uniformly to rejection of restraints premised on the interests at stake here since such interests are adequately served by other measures available to the judiciary.

REASONS FOR GRANTING THE WRIT

The Court Below Has Departed From This Court's Holdings

The judicial orders at issue on this petition are prior restraints, "the most serious and least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n v. Stuart*, *supra*, 427 U.S. at 559. As the Court, in an opinion of Justice Holmes, has long recognized, "the main purpose of [the First Amendment] is 'to prevent all such *previous restraints* upon publications as had been practiced by other governments.' " *Patterson v. Colorado ex rel. Attorney General*, 205 U.S. 454, 462 (1907) (emphasis in the original). *And see New York Times Co.* v. *United States*, 403 U.S. 713 (1971); *Organization for a Better Austin* v. *Keefe*, 402 U.S. 415 (1971); *Near* v. *Minnesota*, 283 U.S. 697 (1931). So consistent are the authorities to the effect that, in Professor Alexander Bickel's words, "[p]rior restraints fall on speech with a brutality and a finality all their own" and that "it is the

hypothesis of the First Amendment that injury is inflicted on our society when we stifle the immediacy of speech",[2] that prior restraints with respect to news reporting about judicial proceedings were viewed as all but absolutely forbidden even prior to this Court's decision striking down such a restraint in *Nebraska Press*.

In that decision the Court held that even reporting as to a confession of a number of brutal murders and sexual assaults in a small Nebraska town should not be restrained. It noted the important role the press plays in reporting on the system of justice and its role in

> " 'guard[ing] against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism.' *Sheppard* v. *Maxwell*, 384 U.S. at 350." 427 U.S. at 560.

It reaffirmed that " 'any prior restraint on expression comes to this Court with a "heavy presumption" against its constitutional validity.' *Carroll* v. *Princess Anne*, 393 U.S. 175, 181 (1968)." 427 U.S. at 558.

The Court gave effect to the "heavy presumption" in requiring that any proposed restraint premised on a vindication of a criminal defendant's constitutional rights be supported by a judicial determination (a) that *more* than a mere possibility that the threatened publicity "*could* impinge upon the defendant's right to a fair trial" existed, 427 U.S. at 563 (emphasis in the original); (b) that no "measures short of an order restraining all publication would have insured the defendant a fair trial," *id.*; and (c) that the restraint would effectively protect the defendant's rights.[3] *Id.* at 565. The Court determined that the prior restraint imposed there was defective in each respect.

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2 A.M. Bickel, *The Morality of Consent* 61 (1975).

3 Even the briefest delay in publication effected by judicial order is subjected to the scrutiny of the tests established in *Nebraska Press* notwithstanding that the order in question "does not prohibit but only

The Court's opinion emphasized that far from being "exceptional" the record before it was "illustrative" of the problems inherent in satisfying its test—and in justifying a prior restraint premised on the asserted need to protect a defendant's right to a fair trial. *Id.* at 569.

In a concurring opinion, Justice Brennan (writing for himself and Justices Stewart and Marshall) concluded that:

> "The right to a fair trial by a jury of one's peers is unquestionably one of the most precious and sacred safeguards enshrined in the Bill of Rights. I would hold, however, that resort to prior restraints on the freedom of the press is a constitutionally impermissible method for enforcing that right; judges have at their disposal a broad spectrum of devices for ensuring that fundamental fairness is accorded the accused without necessitating so drastic an incursion on the equally fundamental and salutory constitutional mandate that discussion of public affairs in a free society cannot depend on the preliminary grace of judicial censors." 427 U.S. at 572-73.

Justice Stevens declined to adopt the general rule urged by Justice Brennan "without further argument" on a variety of questions, but recognized that at the end of the day he too might well adopt Justice Brennan's "ultimate conclusion." 427 U.S. at 617. Justice White explicitly noted his views that the very reasons canvassed by the Court gave him "grave doubt" "whether orders with respect to the press such as were entered in this case would ever be justifiable." *Id.* at 570-71. He declined to go further in that case, at least in the absence of "a broader spectrum of cases presenting similar issues," but noted:

> "If the recurring result, however, in case after case is to be similar to our judgment today, we should at some point announce a more general rule and avoid the inter-

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postpones publication." 427 U.S. at 560. And such tests apply even though the delay is sought only for a "temporary restraint [intended] solely to permit [the Government] to study and assess the impact" of the proposed publication. *Id.* at 559.

minable litigation that our failure to do so would necessarily entail." *Id.*

Amici submit that the "broader spectrum of cases," 427 U.S. at 571, presented to the lower courts in the 14 years since *Nebraska* has made clear both the accuracy of Justice White's belief that a "recurring result" might be discerned and, more recently, the danger inherent in the failure to adopt a general rule barring prior restraints premised on such basis.

In case after case the lower courts have recognized that even pervasive pretrial publicity is not a bar to empanelling an untainted jury and that available devices such as voir dire and change of venue have provided fully adequate protection even in cases involving the highest possible visibility. *See, e.g., In re Charlotte Observer*, 882 F.2d 850 (4th Cir. 1989), summarizing the successful judicial use of *voir dire* to protect against unfair publicity in even the most notorious of cases. (The court dealt there with the trial of former PTL leader Rev. Jim Bakker and referred, *inter alia*, to the Watergate, Abscam and DeLorean prosecutions).[4]

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4 The Fourth Circuit noted the ability of courts to defuse pretrial publicity concerns:

> "Cases such as those involving the Watergate defendants, the Abscam defendants, and more recently, John DeLorean, all characterized by massive pretrial media reportage and commentary, nevertheless proceeded to trial with juries which—remarkably in the eyes of many—were satisfactorily disclosed to have been unaffected (indeed, in some instances, blissfully unaware of or untouched) by that publicity. See, e.g., *Columbia Broadcasting Systems, Inc.* v. *United States District Court*, 729 F.2d 1174, 1181 (9th Cir. 1983) (noting, in DeLorean case, evidence of rapid dissipation of pretrial publicity effects in large metropolitan areas); *In re National Broadcasting Co.*, 635 F.2d 945, 953 (2d Cir. 1980) (noting in Abscam case that many prospective jurors do not follow news of highly publicized prosecutions closely); *United States* v. *Mitchell*, 551 F.2d 1252, 1262 n. 46 (D.C. Cir. 1976), (noting in John Mitchell case that ten of twelve jurors selected in Watergate trial 'claimed to have followed Watergate casually, if at all'), *rev'd on other grounds sub nom. Nixon* v. *Warner Communications*, 435 U.S. 589, 98 S.Ct. 1306, 55 L.Ed.2d 570 (1978). Increasingly the courts are expressing

Indeed even where, as here, the allegedly prejudicial material consisted of tapes of defendant himself, courts have refused to find prior restraints to be necessary to protect a defendant's interest in a fair trial. *Columbia Broadcasting Systems, Inc.* v. *U.S. District Court*, 729 F.2d 1174 (9th Cir. 1983). Strikingly, despite the claims of enormous prejudicial publicity, a jury, subjected to vigorous voir dire, *acquitted* defendant John DeLorean in that case, despite the broadcast of the allegedly incriminating videotapes of the defendant. *See also Hunt* v. *National Broadcasting Co.*, 872 F.2d 289 (9th Cir. 1989); *United States* v. *McKenzie*, 697 F.2d 1225 (5th Cir. 1983); *Goldblum* v. *National Broadcasting Co.*, 584 F.2d 904 (9th Cir. 1978); *State* v. *Coe*, 101 Wash. 2d 364, 679 P.2d 353 (1984); *State ex rel. Miami Herald Publishing Co.* v. *McIntosh*, 340 So.2d 904 (Fla. 1977); *Des Moines Register and Tribune Co.* v. *Osmundson*, 248 N.W.2d 493 (Iowa 1976).

But this pattern has been broken within this past year. At least seven prior restraints have been entered within the last 11 months. Six of them are detailed in the margin. They affected publishers of small newspapers and trade newsletters, book publishers, television syndicators and a criminal

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confidence that *voir dire* can serve in almost all cases as a reliable protection against juror bias however induced. See, e.g., *Press-Enterprise II*, 478 U.S. at 15, 106 S.Ct. at 2743; *Nebraska Press Ass'n.* v. *Stuart*, 427 U.S. 539, 563-64, 96 S.Ct. 2791, 2804-05, 49 L.Ed.2d 683 (1976); *Seattle Times Co.* v. *United States District Court*, 845 F.2d 1513, 1517-18 (9th Cir. 1988); *United States* v. *Peters*, 754 F.2d 753, 762 (7th Cir. 1985); *In re National Broadcasting Co.*, 635 F.2d at 953." 882 F.2d at 855-56

See also United States v. *Poindexter*, 725 F.Supp. 13, 37 (D.D.C. 1989) (change of venue of trial of John Poindexter not warranted as "both in Watergate and the *North* case, it was found possible to assemble an impartial jury notwithstanding publicity that was far more widespread than in the instant case"); *United States* v. *North*, 713 F.Supp. 1444, 1444 (D.D.C. 1989) ("completely impartial jury can be seated" in trial of Oliver North).

defendant. Each restraint was in effect for some period of time but each was ultimately stayed or vacated.[5]

The seventh such restraint was that entered by the district court in this matter and left undisturbed by the Eleventh Circuit. Measured by the three standards set forth in the Court's opinion in *Nebraska Press*, the prior restraint here cannot be justified.

Thus, there is no basis to conclude that *any* disclosures of conversations between General Noriega and representatives of his lawyers would taint the jury in the trial process, let alone taint it in a fashion that could not be prevented by the "traditional" protections of jury voir dire or change of venue. Indeed, the District Court made no such finding.[6] Similarly,

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5 *In re Charlotte Observer*, No. 90-5912 (4th Cir. Nov. 6, 1990) (unpublished) (district court imposed prior restraint on publication of information divulged in open court; court of appeals vacated order); *United States* v. *Northrop Corp.*, 1990 WESTLAW 71352 (C.D. Cal. Feb. 15, 1990), *stayed*, No. 90-70081 (9th Cir. Feb. 16, 1990) (prohibition on television broadcast of institutional messages of corporate defendants entered to protect the right of the United States to a fair trial of criminal charges brought by it; stayed by the Ninth Circuit and mooted by subsequent guilty pleas); *Israel* v. *St. Martin's Press, Inc.*, 560 N.Y.S.2d 450 (1st Dep't 1990) (publication of book on the Israeli intelligence agency, Mossad, barred by the New York Supreme Court on the ground that it might endanger the lives of Israeli agents; order vacated by New York Appellate Division on the ground that the Israeli claims had not been proved and that the order was ineffective in light of prior distribution of book); *In re King World Productions, Inc.*, 898 F.2d 56 (6th Cir. 1990) (district court granted injunction under 18 U.S.C. § 2511 against broadcast of tape of doctor made by reporter posing as a patient; Court of Appeals vacated); *In re Lifetime Cable*, 17 Media L. Rep. (BNA) 1648 (D.C. Cir. 1990) (district court granted injunction against telecast on privacy grounds; Court of Appeals vacated); *Ernst & Young* v. *Bowman's Accounting Report*, No. 426/90-001 (Sup. Ct. N.Y. Co. Jan. 8, 1990), *vacated* (1st Dep't Jan. 18, 1990) (lower court granted injunction against reporter's disclosure of confidential business information; appellate court vacated on the ground that others had already published the data).

6 It would be particularly hard to find such prejudicial publicity to have been created by the tapes when the court has already declined to

if the concern were the possible taint of the prosecution team by attorney-client material, the recent Iran-Contra prosecutions demonstrate the ability of courts and prosecutors to deal with far larger volumes of "off limits" material (in that case immunized testimony) without denying defendants a fair trial. *United States* v. *North*, 910 F.2d 843 (D.C. Cir. 1990); *see also United States* v. *Byrd*, 765 F.2d 1524 (11th Cir. 1985); *United States* v. *Serrano*, 870 F.2d 1 (1st Cir. 1989). And whatever the legal significance of the taping of the conversations between defendant and counsel by the government in the first place, the courts have consistently declined to find that inadvertent exposure to privileged material (such as could result from the viewing of broadcast tapes) would, without more, constitute a *per se* violation of Sixth Amendment rights. *Weatherford* v. *Bursey*, 429 U.S. 545 (1977).

Whether or not the original taping of General Noriega's conversations by the government constituted prosecutorial misconduct, CNN's reporting of that fact and its broadcast of tapes alleged to include attorney-client material is not an act entitling defendant to a prior restraint. If the court's concern is the government's original taping, the court can deal with that in the criminal case or General Noriega can maintain a subsequent civil action to vindicate his claim of *governmental* misconduct. *See Weatherford*, *supra*. If the concern is that CNN's broadcast will spread privileged material to previously untainted prosecutors—privileged material recorded by the government—then the court has a variety of devices to protect the prosecution from taint. In either case the problem is not one that need be addressed by imposing a prior restraint on CNN.[7]

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sever other defendants from joint trial with General Noriega despite allegations that co-defendants face the risk of prejudicial publicity in light of charges by President Bush that General Noriega is a " 'thug', a 'Narco-terrorist' and a 'poisoner of our children.' " *United States* v. *Noriega*, 1990 WESTLAW 156552, at 12 n.5 (S.D. Fla. Oct. 9, 1990).

7 In the opinions below, the attorney-client character of some of the materials seemed to take on a life of its own, one invested with talis-

The courts below seemed to view CNN's refusal to make available the tapes it had obtained as exempting the judiciary from having to make the findings required by *Nebraska Press*. App. 15a-16a, 22a, 24a-27a. Indeed, the opinions often read as though it were CNN's burden to prove that its broadcast will *not* result in prejudice. App. 22a. The District Court refers to the "unique nature of the problem facing this court" because it lacked knowledge of the content of the proposed publication. App. 27a. But the refusal to turn over material obtained by journalists and the resulting uncertainty as to the content of the material at issue on the motion for a prior restraint is nothing new in this context. Such refusals occurred in both *Goldblum* v. *National Broadcasting Corp.*, 584 F.2d 904 (9th Cir. 1978) (Kennedy, J.), and *In re C.B.S., Inc.*, 570 F. Supp. 578 (E.D. La. 1983), *app. dismissed*, 735 F.2d 907 (5th Cir. 1984). In neither case did the court involved conclude that its obligation to give effect to the *Nebraska Press* standards required that the journalists make their materials available for pre-broadcast inspection. Yet that is precisely what the courts below demanded. And, when such material was not forthcoming, the court held that CNN had failed to discharge *its* supposed burden of showing that the material to be broadcast would *not* lead to prejudice to the defendant. But as Justice Brennan noted in *Nebraska Press*, the Constitution does not require that the discussion of

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manic significance. See opinion of Eleventh Circuit at 14-16. The privileged nature of a communication, of course, may be relevant both in assessing the extent of potential prejudice and in judging whether governmental misconduct was at issue. But it does not follow that the potential prejudice, if any, flowing from the disclosure of trial strategy leads to a *per se* violation of the Sixth Amendment (*see Weatherford, supra*) or would compromise that constitutional right any more than the disclosures of the confession in *Nebraska Press*.

Moreover, CNN is the exposer of the facts bearing on the alleged misconduct. It is performing the very oversight of the judicial process one expects of the press; it should hardly be barred from disclosing the facts bearing on such issues. It would be a bizarre rule of law if, in order to protect the government against the consequences of its own alleged misconduct in violating a criminal defendant's rights, CNN's own First Amendment rights need be forfeited.

public affairs can be made to depend "on the preliminary grace of judicial censors." 427 U.S. at 573.[8] Even if one assumed the most prejudicial of taped statements (hardly likely to be worse than the multiple-murder confessions at issue in *Nebraska Press* itself), neither court below explained why the traditional protective devices would not suffice, or why it was confident that the restraint would be effective. There was no need to view the tapes when it was plain that the standards in *Nebraska Press* could not be met in any event. The orders below, however well intentioned, cannot survive the three *Nebraska Press* inquiries, inquiries which the District Court and Court of Appeals in any event failed to make. Given this Court's recognition that even the briefest of delays can irreparably damage the constitutional rights of a free press, this itself provides a basis for a stay of the prior restraint against broadcast now in effect. *Nebraska Press Ass'n* v. *Stuart*, *supra*; *Elrod* v. *Burns*, 427 U.S. 347, 373 (1976) (plurality opinion).

But a larger issue is posed. Fair trial rights are quite properly an abiding, daily concern of the federal and state judiciary. The "traditional" alternatives to prior restraints—prolonged voir dire, change of venue, sequestration of jurors, rigorous isolation procedures for prosecutors—can be cumbersome, time-consuming and expensive. In such circumstances there is a real risk that judges, precisely *because* of their dedication to protecting the trial rights of the criminal defendants before them, would be "predisposed to grant [a motion for a prior restraint], both to ease their task of ensur-

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8 Justice Brennan also made clear the risks inherent in having the Court engage in any sort of balancing of press vs. fair trial rights on a case-by-case basis, since in such situations, "judges would be forced to evaluate whether the public interest in receiving the information outweighed the speculative impact on Sixth Amendment rights." 427 U.S. at 607. Fully aware of that risk, we nevertheless note how significant a role the press plays in the present case, where the extraordinary actions of the executive branch in General Noriega's capture, as well as the unusual concerns about the functioning of the judicial process in the wake of such executive action, make all the more desirable the most rigorous and autonomous journalistic scrutiny and commentary on the proceedings.

ing fair proceedings and to insulate their conduct in the criminal proceeding from reversal." *Nebraska Press*, *supra*, 427 U.S. at 608 (Brennan, J., concurring).[9]

Through the past decade, judicial efforts to protect the fair trial rights of criminal defendants have several times led to imposition of restraints that put the press and trial courts in unnecessarily confrontational roles. *See*, *e.g.*, *Goldblum*, *supra*; *In re C.B.S., Inc.*, *supra*. This has led to instances of the very complex and "interminable litigation" that Justice White feared.[10]

In the past, the courts of appeals have recognized the unacceptable nature of well-intentioned but unconstitutional efforts to limit the ability of the press to determine what to print. The failure of the Court of Appeals in this case to come to a similar recognition, and the increasing willingness of lower courts to grant prior restraints, present this Court with the opportunity to give effect to the lesson that can be

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9 Some sense of that unduly narrow focus is reflected in the Eleventh Circuit's reference (in a quotation dealing with access, *not* a prior restraint) to the District Court's obligation to protect a defendant's fair trial rights as the Court's "*primary responsibility*." App. 7a (emphasis added). The language of *Nebraska Press* is precisely to the contrary: there is to be no priority drawn between the First and Sixth Amendments. 427 U.S. at 561. In this, as in other respects, the Eleventh Circuit's repeated emphasis on cases involving access, not prior restraints, has a consistently distorting effect on its analysis, since this Court has distinguished between the press' right to publish what it obtains free of prior restraints and the balance to be struck when the press seeks governmental authorization for access to documents or proceedings. *Houchins* v. *KQED, Inc.*, 438 U.S. 1, 9 (1978); *Landmark Communications, Inc.* v. *Virginia*, 435 U.S. 829, 849 (1978) (Stewart, J., concurring). The court below ignored this distinction.

10 As the Ninth Circuit (Kennedy, J.) observed with respect to the tangled litigation position that emerges from such confrontations:

> "A broadcaster or publisher should not, in circumstances such as those in this case, be required to make a sudden appearance in court and then to take urgent measures to secure appellate relief, all the while weighing the delicate question of whether or not refusal to comply with an apparently invalid order constitutes a contempt." *Goldblum*, *supra*, 584 F.2d at 907.

drawn from the "broader spectrum of cases," 427 U.S. at 571 (White, J., concurring), that have arisen in the years since *Nebraska Press* was decided. *Amici* urge the Court to grant review in order to assess the fidelity of the decision below to this Court's teachings in *Nebraska Press* and to consider adoption of a general rule prohibiting prior restraints in the fair trial/free press area.

CONCLUSION

For the reasons set forth herein and in the Petition for a Writ of Certiorari, the Petition should be granted.

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(4)
90-767
No. ——
Supreme Court, U.S.
FILED
NOV 15 1990
SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

CABLE NEWS NETWORK, INC.,
Petitioner,
v.
GENERAL MANUEL NORIEGA and
UNITED STATES OF AMERICA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF OF AMERICAN SOCIETY OF NEWSPAPER EDITORS, CAPITAL CITIES/ABC, INC., CBS INC., NATIONAL ASSOCIATION OF BROADCASTERS, THE NATIONAL CABLE TELEVISION ASSOCIATION, INC., RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION, THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, THE SOCIETY OF PROFESSIONAL JOURNALISTS, AND WESTINGHOUSE BROADCASTING CO., INC., AS AMICI IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the First Amendment permits a federal district court to enjoin a telecast in order to protect a defendant's right to a fair trial where there is no record support or findings establishing that such extraordinary relief is essential or that available alternatives are inadequate.

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BRIEF OF AMERICAN SOCIETY OF NEWSPAPER EDITORS, CAPITAL CITIES/ABC, INC., CBS INC., NATIONAL ASSOCIATION OF BROADCASTERS, THE NATIONAL CABLE TELEVISION ASSOCIATION, INC., RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION, THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, THE SOCIETY OF PROFESSIONAL JOURNALISTS, AND WESTINGHOUSE BROADCASTING CO., INC., AS AMICI IN SUPPORT OF PETITIONER[1]

STATEMENT OF INTEREST

These *Amici* are organizations that disseminate the news and associations of journalists, broadcasters, and cable casters. They believe that the ability of journalists to present the news free of prior restraints by government, and the opportunity of the public to receive such news, are central to the First Amendment and essential for a free society. They also believe that the decision below, if allowed to stand, would seriously undermine these First Amendment protections, not only in this case but in future cases.

THE PETITION FOR CERTIORARI SHOULD BE GRANTED

I. THE ISSUES ARE IMPORTANT AND ARE FREQUENTLY RECURRING

This is the first case since *New York Times v. United States*, 403 U.S. 713 (1971) (per curiam), in which a federal court of appeals has upheld the imposition of a prior restraint on the dissemination of news. The district court has barred petitioner Cable News Network, Inc. ("CNN") from publishing conversations between General Manuel Noriega and his defense counsel, apparently taped

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[1] Statements of consent are on file with the Clerk of the Court. *See* S. Ct. R. 37.2.

by the government while Noriega was in prison.[2] The constitutional question is of profound significance.

The telecast at issue seeks to address a matter of considerable importance: it is designed to advise the American public of a defendant's claim of potentially serious misconduct by the government in a highly publicized and unusual prosecution of a former foreign head of state.

The effect of the district court's order barring that telecast is not confined to this case. Criminal trials are, by their very nature, newsworthy events, and criminal trials involving claimed misconduct of public officials, whether foreign or domestic, are especially newsworthy. The decision of the court of appeals raises the threat of censorship of a broad range of journalism concerning criminal proceedings. Thus, while the order here directly affects only the publication of taped conversations between defendant Noriega and his counsel, its implications are far-reaching.[3]

The decision of the Eleventh Circuit in this case sustaining an injunction against publication represents an unwarranted and unprecedented invasion of the First Amendment rights of the news media and the public they serve. In four distinct respects the court of appeals has departed from established law. (1) Despite the strong presumption against prior restraints, a presumption as old as the Republic itself, the court of appeals has equated the standards against prior restraint with the standard for a First Amendment right of access and in doing so has substantially diluted the rule against prior restraints. (2) The court of appeals has improperly placed upon the

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[2] The present case does not involve the constitutionality of the district court's initial oral order designed to provide the court with time to deliberate on the issues raised by the motion. *See* Tr. 78-81 (Nov. 8, 1990 Hearing). Nor does this case involve the constitutionality of any contempt citation against CNN for having broadcast a portion of the tapes. *See* Tr. 126-27 (Nov. 9, 1990 Hearing).

[3] *See Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976) ("[T]he protection against prior restraint should have particular force as applied to reporting of criminal proceedings . . . .").

news organization the burden of showing that no injunction should issue, contrary to the decision of this Court in *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976), and numerous court of appeals decisions. (3) The court of appeals has erroneously held that an admittedly speculative showing of injury is sufficient to justify a prior restraint. (4) The court of appeals has failed to consider alternative means for protecting both the defendant's right to an impartial jury, his right to counsel, and the interests of the United States in maintaining the prosecution.[4]

These *Amici* urge that this Court grant certiorari in this case and order expedited briefing and argument on the merits.

II. THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS

The Eleventh Circuit's decision conflicts with decisions of this Court and of other Courts of Appeals that have uniformly invalidated prior restraints designed to pro-

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[4] As the court of appeals noted, Mr. Rubino, counsel for Noriega, "cooperated with CNN by reviewing an audio tape of conversations purportedly between Noriega and Ms. Cristina Machin ("Machin") (Rubino's secretary and interpreter) and verified the authenticity of the tape recording. A portion of the interview between a CNN reporter and Rubino (together with Machin) in Rubino's office appears in the telecast." *Cable News Network, Inc. and Turner Broadcasting System, Inc. v. Manuel Antonio Noriega and the United States of America*, No. 90-5927, slip op. at 5 (11th Cir. Nov. 10, 1990) (hereinafter "CNN slip op."). This case thus presents the extraordinary spectacle of a defendant in a criminal case who has cooperated in the production of a news broadcast and then seeks to enjoin the broadcast on the ground that its dissemination will deny him the right to a fair trial. These unusual circumstances suggest that the defendant's injunctive request should not have been seriously entertained in the first place since defendant failed to satisfy the traditional standards for equitable relief. *See* C. Wright & A. Miller, Federal Practice and Procedure: Civil § 2946 (1973) (recognizing unclean hands as a basis for denying equitable relief).

tect fair trial rights. Although in *Nebraska Press* the Court may not have completely foreclosed all prior restraints,[5] it recognized that such an order would survive constitutional scrutiny only in the most extraordinary circumstances, *id.* at 558-69, that is, where it was "clear that further publicity, unchecked, would so distort the views of potential jurors that 12 could not be found who would, under proper instructions, fulfill their sworn duty to render a just verdict exclusively on the evidence presented in open court." *Id.* at 569.

Since this Court's decision in *Nebraska Press*, the courts of appeals have consistently rejected claims that a prior restraint on the press is justified based on the need to protect a defendant's right to a fair trial. In *CBS v. United States District Court*, 729 F.2d 1174 (9th Cir. 1984), for example, the Ninth Circuit vacated an order restraining CBS from "disseminating and/or broadcasting any portion of any and all government surveillance tapes generated in the investigation and prosecution" of John DeLorean. *Id.* at 1176. The Ninth Circuit noted that "federal and state appellate courts have held without exception that trial court restraints on the report-

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[5] The majority opinion did not state that such prior restraints are never constitutional, but three members of the Court did articulate that view. 427 U.S. at 572-73 (Brennan, J., concurring, joined by Stewart and Marshall, JJ.). The District of Columbia Circuit has concluded that " 'the practical impact of the rule announced by [the majority] . . . is to outlaw all prior restraints in fair trial/free press cases,' " *In re Halkin*, 598 F.2d 176, 183 n.14 (D.C. Cir. 1979), *quoting* Goodale, *The Press Ungagged: The Practical Effect on Gag Order Litigation of Nebraska Press Association v. Stuart*, 29 Stan. L. Rev. 497, 498 (1977). *See also* L. Tribe, *American Constitutional Law* § 12-11 at 858-59 (2d ed. 1988) (the majority opinion in *Nebraska Press* "suggests that the Court has gone further and announced a virtual bar to prior restraints on reporting news about crime"); 2 ABA *Standards for Criminal Justice* Chap. 8, Standard 8-3.1 (2d ed. 1980) ("ABA Standards") ("No rule of court or judicial order shall be promulgated that prohibits representatives of the news media from broadcasting or publishing any information in their possession relating to a criminal case.").

ing of judicial proceedings failed to meet the requirements set forth in *Nebraska Press*." *Id.* at 1178.

Similarly, in *United States v. McKenzie*, 697 F.2d 1225 (5th Cir. 1983), the Fifth Circuit held that a prior restraint of a CBS 60 Minutes news program was not justified by a defendant's claim that broadcast of the program would impair his Sixth Amendment right to a fair trial. *Id.* at 1227. The Fifth Circuit stressed that in imposing the prior restraint, the district court had failed to make specific factual findings as to the potential prejudice to the defendant arising from the broadcast and the inadequacy of alternative methods of protecting the defendant's interests. *Id.* Other decisions have also held prior restraints unconstitutional.[6] The ruling of the Eleventh Circuit in this case cannot be squared with these authorities.

III. THE DECISION BELOW IS CLEARLY INCORRECT

The district court's order is a classic prior restraint on the press, and the extraordinary circumstances necessary to justify such a restraint are not even remotely established by this record.

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[6] *See In re Providence Journal*, 820 F.2d 1342, 1348 (1st Cir. 1986) ("When . . . the prior restraint impinges upon the right of the press to communicate news and involves expression in the form of pure speech . . . the presumption of unconstitutionality is virtually insurmountable."), *modified*, 820 F.2d 1354 (1st Cir. 1987) (en banc), *cert. dismissed*, 485 U.S. 693 (1988); *In re King World Productions*, 898 F.2d 56 (6th Cir. 1990) (vacating injunction restraining broadcast of scenes allegedly obtained by illegal surreptitious surveillance); *In re Lifetime Cable*, 17 Media L. Rep. (BNA) 1648 (D.C. Cir. 1990) (vacating order restraining broadcast of minor's description of alleged sexual abuse); *Hunt v. National Broadcasting Co.*, 872 F.2d 289 (9th Cir. 1989) (repecting injunction based on claim that a docudrama's portrayal of a murder conviction might prejudice a trial on a second murder); *Goldblum v. National Broadcasting Corp.*, 584 F.2d 904 (9th Cir. 1978) (vacating a trial court order demanding that a television network turn over a film to the district court so that the court could view it for "inaccuracies"); *see also In re Halkin*, 598 F.2d at 183 n.14 (concluding that "practical impact" of *Nebraska Press* "is to outlaw all prior restraints in fair trial/free press cases").

A. The Court Of Appeals Erred In Equating The Presumption Against Prior Restraints With The Standards For A Right Of Access By The News Media.

Although the court of appeals acknowledged that the district court's order infringed "CNN's First Amendment right to be free from prior restraints against the broadcasting of newsworthy information," CNN slip op. at 2, it nonetheless relied almost exclusively on cases involving issues of *access* to trial proceedings or documents, rather than *prior restraints* on publication of information, in developing a legal standard for its ruling.[7] The court of appeals thus confused the standards for determining a district court's ability to control who has access to a court proceeding or court document with a court's ability to control what the media does with information it has already obtained. The standards in these two areas of law are not the same.

In the area of access, a trial court may permissibly weigh a defendant's Sixth Amendment right to a fair trial against the right of the press and public to gain access to trial proceedings or documents. In unusual circumstances, where a court specifically finds that (1) public access to trial proceedings or documents will likely prejudice the defendant's right to a fair trial, (2) denial of access will prevent the prejudice, and (3) no alternative to denial of access would adequately protect against

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[7] The court of appeals quoted extensively from *United States v. Gurney*, 558 F.2d 1202 (5th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978), which, as the cited portion in the decision below indicated, pertains not to prior restraints on publication, but instead to a trial court's ability to manage the courtroom by limiting "right of access to criminal proceedings." *Id.* at 1209. The court of appeals also misdescribed *Belo Broadcasting Corp. v. Clark*, 654 F.2d 423 (5th Cir. Unit A Aug. 1981). The Fifth Circuit in that case did not deny broadcasters the right to broadcast audiotapes that were already in their possession, but instead denied the broadcaster's request to copy the tapes from the trial record. Thus, the Fifth Circuit in *Belo Broadcasting* did not "determin[e] that the Constitution did not accord the broadcasting stations the right to play the tapes over the air waves," CNN slip op. at 10; instead, the court in that case merely determined that the broadcasters did not have the right to demand access to the tapes.

the perceived harm, a court may limit the press and public's access to trial proceedings or documents. *Press-Enterprise v. Superior Court*, 478 U.S. 1, 14 (1986).

This case, however, does not pertain to access to trial proceedings or documents at all: CNN already has the tapes, and the only issue is whether the district court can constitutionally restrain CNN from broadcasting information in its possession. In short, it directly raises the issue of whether the district court can impose a prior restraint on CNN. Whatever authority a court may have to regulate access to information about a judicial proceeding, no court, absent the most extraordinary circumstances, may constitutionally restrain the press from publishing information already received.

This Court repeatedly has distinguished between cases pertaining to right of access to trials and documents and those imposing prior restraints. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 586 (1980) (distinguishing right-of-access cases from prior-restraint cases, where "free speech protections are almost insurmountable"). As Justice Stevens stated in *Press-Enterprise*, 478 U.S. at 17:

> Although perhaps obvious, it bears emphasis that the First Amendment right asserted by petitioner [to have access to a preliminary hearing] is not a right to publish or otherwise communicate information lawfully or unlawfully acquired. That right, which lies at the core of the First Amendment and which erased the legacy of restraints on publication against which the drafters of that Amendment rebelled, may be overcome only by a governmental objective of the highest order attainable in no less intrusive way. The First Amendment right asserted by petitioner in this case, in contrast, is not the right to publicize information in its possession, but the right to acquire access thereto. (citations omitted) (Stevens, J., dissenting).[8]

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[8] *Accord Gannett Co. v. DePasquale*, 443 U.S. 368, 393 n.25 (1979); *id.* at 399 (excluding "members of the press from the courtroom . . . differs substantially from the 'gag order' at issue in *Nebraska Press*") (Powell, J., concurring).

With the exception of the Eleventh Circuit in this case, the courts of appeals have uniformly recognized this distinction.[9]

The exacting standards for the imposition of prior restraints far exceed the showing required for denial of a right of access: prior restraints are uniformly subjected to more stringent (and almost always fatal) scrutiny. In *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931), this Court recognized that "it has been generally, if not universally, considered that it is the chief purpose of [the constitutional guarantee of freedom of the press] to prevent previous restraints upon publication." *Id.* at 713. That a system of prior restraint is repugnant to the First Amendment and therefore is presumptively unconstitutional has been the unwavering position of the Court ever since.[10] In *New York Times v. United States*, 403 U.S. 713 (1971), the Court found that even the most pressing concerns of national security urged by the government in that case did not justify the imposition of a prior restraint. And in *Nebraska Press*, the Court, noting that prior restraint of publication is "the most serious and the least tolerable infringement on First Amendment rights," 427 U.S. at 559, struck down a restraining order designed to protect Sixth Amendment fair trial rights in a murder case, making clear that

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[9] *See, e.g., Application of Dow Jones & Co.*, 842 F.2d 603 (2d Cir. 1988), *cert. denied*, 488 U.S. 946 (1988) (order limiting access of press to extrajudicial statements of counsel not a prior restraint); *In re Gannett News Service*, 772 F.2d 113, 116 (5th Cir. 1985) (upholding district court's order sealing evidence because "temporary denial of access such as involved here constitutes no form of prior restraint"); *United States v. Beckham*, 789 F.2d 401, 409 (6th Cir. 1986) (denial of news media's request to copy tape recordings admitted as evidence in criminal trial upheld).

[10] *See, e.g., Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963); *Carroll v. Princess Anne*, 393 U.S. 175, 181 (1968); *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 418 (1971) (injunction imposing prior restraint is "an impermissible restraint on First Amendment rights").

such orders are rarely, if ever, permissible. The Court noted that "[t]he Court has interpreted [the guarantees of the First and Fourteenth Amendments] to afford special protection against orders that prohibit the publication or broadcast of particular information or commentary—orders that impose a 'previous' or 'prior' restraint on speech." *Id.* at 556.

Prior restraints uniquely threaten protected expression. As the Court explained in *Nebraska Press*, sanctions imposed after publication are subject to numerous protections, and their impact does not become fully operative until after appellate review. In contrast, a prior restraint "has an immediate and irreversible sanction. If it can be said that a threat of criminal or civil sanctions after publication 'chills' speech, prior restraint 'freezes' it at least for the time." [11] Those who might otherwise publish and risk punishment will generally be unwilling to defy an injunction and thus face the contempt power.[12]

In short, the party claiming that a prior restraint is justified bears the ultimate burden of justifying the restraint, and this burden is an extraordinarily heavy one.[13]

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[11] 427 U.S. at 559, *citing* A Bickel, *The Morality of Consent* 61 (1975).

[12] *Bernard v. Gulf Oil Co.*, 619 F.2d 459, 460 n.15 (5th Cir) 1980) (en banc), *aff'd*, 452 U.S. 89 (1981). Justice Brennan has provided a catalogue of further reasons for presuming that prior restraints on expression are unconstitutional. *Nebraska Press*, 427 U.S. at 589-90, *quoting* T. Emerson, *The System of Freedom of Expression* 506 (1970).

[13] *See Nebraska Press*, 427 U.S. at 561-65; *see also Freedman v. Maryland*, 380 U.S. 51, 58 (1965) (burden of justifying restriction of speech falls on the censor); *Speiser v. Randall*, 357 U.S. 513, 525-26 (1958); L. Tribe, *American Constitutional Law* § 12-39 at 1059 (2d ed. 1988).

B. There Has Been No Showing Of A Compelling Justification For the Injunction Issued Here.

This Court has never upheld a prior restraint as necessary to protect a defendant's right to a fair trial, and the defendant in this case has not come close to establishing that this case qualifies as a first exception. Two separate "fair trial" justifications have been offered here for the injunction—the need to protect the defendant's right to an impartial jury and the need to protect the defendant's right to counsel. Neither the Motion for Injunction filed by defendant Noriega, nor the subsequent hearings before the district court, came close to showing that a prior restraint was justified on either ground.

1. *The Injunction Cannot Be Justified As Designed To Protect The Defendant's Right To A Fair And Impartial Jury.*

Defendant Noriega's Motion for Injunction did not present any facts refuting his ability to secure a fair and impartial jury. It did not address the number of individuals in the jury pool or the likelihood that they would hear the particular CNN broadcast, nor did it show that a broadcast of such material would make it impossible to select an impartial jury. *See* Memorandum in Support of Motion for Injunction at 5-7 (Nov. 1990) (hereinafter "Mem. in Support of Injunction"). The motion also made virtually no effort to show that alternatives were unavailable to protect Noriega's right to a fair trial. It simply noted that "exposure of potential jurors to the defendant's own statements and discussions of trial strategy will make selecting an impartial jury problematic." *Id.* at 6-7. Defendant Noriega in fact claimed that many of the attorney-client communications would not even be understandable without an explanation by defense counsel as to the context of the communication, which counsel was unwilling to provide. Tr. 66-67 (Nov. 8, 1990 Hearing).

The district court order and court of appeals opinion are also largely silent on these issues. Although recog-

nizing that this Court's "pronouncements on the doctrine of prior restraint suggests that a factual inquiry is required," the district court made no findings concerning the potential for the broadcast to so taint the jury pool as to make selection of an impartial jury impossible.[14] And the court of appeals itself recognized that, given the state of the record, it was "required to speculate" as to the threat posed by the broadcast to defendant Noriega's right to a fair trial. CNN slip op. at 17.

A similar absence of factual findings in *Nebraska Press* led this Court to strike down a prior restraint. The prior restraint before the Court in that case was prompted by intense and pervasive publicity surrounding a mass sex murder in a town of 850 people. The defendant was arrested the day after the crime amid "widespread news coverage, by local, regional, and national newspapers, radio and television stations." 427 U.S. at 542. Two days later, the trial court, at the request of the prosecutor and the defense attorney, entered an order restricting press coverage to permit the impaneling of an impartial jury. As ultimately modified and presented to this Court, the order barred only the reporting of the existence and contents of confessions or admissions by the defendant. *Id.* at 545. The Court unanimously agreed that even this limited order was unconstitutional, stating that there was "little in the record" to support such an extraordinary remedy. *Id.* at 563.

Under the present facts, there is no basis for a prior restraint to protect the defendant's right to an impartial jury. The district court made no finding that the over-

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[14] *United States v. Noriega*, No. 88-0079-Cr, Supplemental Order at 3-7 (S.D. Fla. Nov. 9, 1990) (hereinafter "Supplemental Order"). The district court appeared to recognize that its decision was inadequate in this regard, stating: "If the invasion or the propogation of the invasion [of attorney-client communications] is not . . . in and of itself legally sufficient to justify enjoining, certainly it would appear necessary to look to the surrounding facts to determine the nature and extent of potential damage before dissemination." Supplemental Order at 5.

whelming majority of the jury pool would view the telecast. The district court here never determined that, even if the allegations made by defendant Noriega regarding the contents of the tap recordings were true and the potential jurors were uniformly exposed to it, the telecast would have led "surely" and inevitably to an unfair trial.[15] A trial court is not entitled to presume that even "intense and pervasive" publicity involving the disclosure of information damaging to the defense would result in an unfair trial. *Nebraska Press* at 562-65.[16] Rather, the triai court must rely on facts demonstrating that, beyond doubt, "further publicity, unchecked, would so distort the views of potential jurors that 12 could not be found who would, under proper instructions, fulfill their sworn duty to render a just verdict exclusively on the evidence presented in open court." *Id.* at 569. No such showing was made here.

Moreover, even if such a showing of harm had been made, the district court failed adequately to consider whether there were alternative, less-restrictive, methods of protecting the defendant's right to an impartial jury. *Nebraska Press* requires a trial court "to determine the probable efficacy of measures short of prior restraint on

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[15] *See* Supplemental Order at 4; *United States v. Noriega*, No. 88-0079-Cr, Order at 5-6 (S.D. Fla. Nov. 8, 1990) (hereinafter "Nov. 8 Order").

[16] As *Nebraska Press* makes clear, a trial judge is not entitled to assume that the exposure of potential jurors to publicity makes them incapable of rendering an impartial verdict:

> [P]retrial publicity, even if pervasive and concentrated, cannot be regarded as leading automatically . . . to an unfair trial. The decided cases "cannot be made to stand for the proposition that juror exposure to information about a state defendant's prior convictions or to news accounts of the crime with which he is charged alone presumptively deprives the defendant of due process."

Nebraska Press, 427 U.S. at 565, *quoting Murphy v. Florida*, 421 U.S. 794, 799 (1975). *See also Calley v. Callaway*, 519 F.2d 184, 205-06 (5th Cir. 1975) (en banc), *cert. denied*, 425 U.S. 911 (1976).

the press and speech." *Id.* at 565.[17] In making this determination, the trial court must bear in mind that the Sixth Amendment right to a fair trial is guarded by a formidable array of protective measures, including change of venue, trial postponement, searching voir dire examination, curative jury instructions, and sequestration. *Id.* at 563-64. This Court has found these measures adequate to withstand huge barrages of publicity adverse to the defendant. Even where there has been "massive pretrial publicity" in the trial court, the Court has concluded that "these procedures would have been sufficient to guarantee [the defendant] a fair trial . . . ." *Sheppard v. Maxwell*, 384 U.S. 333, 358 (1986). Accordingly, any benefits from intruding upon First Amendment freedoms to protect fair trial right here were "conjectural . . . in light of the alternative procedures available to the trial judge." [18]

The district court here did not address any of these potential alternative measures for ensuring defendant Noriega's right to an impartial jury. That fact alone makes the imposition of a prior restraint intolerable under the First Amendment, as *Nebraska Press* and decisions of other circuits following *Nebraska Press* make clear. *Nebraska Press*, 427 U.S. at 563-65; *Journal Publishing Co. v. Mechem*, 801 F.2d 1233, 1236 (10th Cir. 1986); *In re Providence Journal*, 820 F.2d at 1351; *CBS*, 729 F.2d at 1182; *Levine v. United States District Court*, 764 F.2d 590, 595, *cert. denied*, 476 U.S. 1158 (1986); *Bailey v. Systems Innovation, Inc.*, 852 F.2d 93, 99 (3rd Cir. 1988).

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[17] In other contexts, as well, this Court has repeatedly held that, where government action infringes upon First Amendment liberties, the action is unconstitutional if the asserted government interest may be adequately served by alternative measures less offensive to the First Amendment. *Shelton v. Tucker*, 364 U.S. 479, 488 (1960). *See also Louisiana ex rel. Gremillion v. NAACP*, 366 U.S. 293, 296-97 (1961); *Lamont v. Postmater General*, 381 U.S. 301, 310 (1965) (Brennan, J., concurring); *Martin v. City of Struthers*, 319 U.S. 141 (1943).

[18] ABA Standards at 30 (commentary to Standard 8-3.1).

In failing to make factual findings concerning the potential taint of the jury pool and the availability of less-restrictive alternatives to a prior restraint, the district court and court of appeals made much of the fact that CNN did not produce the tape recordings in its possession for review. Supplemental Order at 2-5; CNN slip op. at 16-17. The district court stated:

> It seems fundamentally unfair to allow CNN to benefit from its refusal to disclose the contents of the tapes to the court—that is, to allow CNN to argue that no prior restraint should issue because no clear and immediate harm is apparent when the only reason that no clear and immediate harm yet appears is because CNN has so far prevented this court from reviewing the content of the tapes in its possession.

Supplemental Order at 3. That CNN failed to produce the tape recordings, however, cannot provide a basis for the imposition of a prior restraint.

First, there was simply no need for the district court to view the tapes. Even assuming that they contained highly damaging information, there was no basis for a prior restraint. The general subject matter of the tapes was known to the district court. By focusing on the content of the tapes, the Court ignored its obligation to consider far more relevant factual questions, and the defendant's obligation to make a specific and compelling factual showing that a prior restraint would be justified even assuming the exposure of damaging information.

Second, by placing the onus on CNN to come forward with information, the court improperly shifted the burden to CNN to justify its broadcast. As noted above, the burden of justifying a prior restraint rests always with the movant.

Finally, the district court failed adequately to explain why it could not obtain the tape recordings from the government. To be sure, the district court stated that "[r]equiring Government production would require the Magistrate to review all of the recorded phone calls be-

tween Noriega and his attorneys—potentially hundreds of calls between Noreiga and his attorneys—in search of damaging attorney-client communications." Supplemental Order at 3.[19] That review of the CNN tapes would be "more efficient" than securing the tapes from the government—a step that will eventually be required in any event to discover the extent of the government's misconduct—hardly justifies a prior restraint.[20] It is not surprising that other courts have rejected the claim that the need for access to unpublished information justifies prior restraints.[21]

The district court's order that CNN produce the tape recordings for its review also raises the spectre of impermissible judicial censorship. Once a court commands submission of proposed broadcast material for evaluation of whether the material may properly be disseminated, the power to edit the submission follows ineluctably. With the materials in hand, the court no longer must approve or disapprove the whole, but can pick and choose, approving and disapproving a particular broadcast sentence by sentence. As then Judge (now Justice)

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[19] We note that the government has supplied a log of these tapes to the district court, although the contents of this log were never disclosed to petitioner CNN. *See* Tr. 105-06 (Nov, 9, 1990 Hearing).

[20] The district court also noted that it "is entirely possible that CNN is in possession of communications between Noriega and his lawyers . . . which the Government did not record." This finding is entirely speculative, however. No suggestion was made at the hearing before the district court to indicate that CNN had obtained any recordings other than those made by the government. *See* Tr. 97-99 (Nov. 8, 1990 Hearing).

[21] *See Goldblum*, 584 F.2d at 906 (holding production order of film unconstitutional where "[t]he express . . . purpose of the district court's order . . . was to determine whether or not to issue an injunction suspending its broadcast"); *In re CBS*, 570 F.Supp. 578, 581 (E.D. La. 1983) (holding unconstitutional a "production order . . . to aid the court in deciding whether to enjoin the scheduled broadcast"), *appeal dismissed*, 735 F.2d 907 (5th Cir. 1984).

Kennedy explained in similar circumstances in *Goldblum*, 584 F.2d at 907:

> The district court proceedings . . . intervened in the editorial process by ordering . . . the broadcasting company to produce a film just before its scheduled broadcast so that it could be examined for inaccuracies. A procedure thus aimed toward prepublication censorship is an inherent threat to suppression, one that chills speech.[22]

The censor's power to edit need not, and typically does not, rest on formal autohrity to edit. Sufficient is the power to block publication of the material as submitted, while suggesting that if only suitable modifications were made, the new text would receive the imprimatur. A federal judge rests his editorial suggestions on the foundation of power to order that the publication not issue on pain of contempt sanctions.[23] Such editorial suggestions are not easily distinguished from commands.[24]

2. *The Injunction Cannot Be Justified As Protecting Privileged Information or Defendant's Right To Counsel.*

While the court below also sought to justify the injunction as designed to protect the defendant's right to counsel, Supplemental Order at 2-4, no showing was made that the prior restraint imposed here was necessary to preserve the privileged nature of Noriega's conversations with members of his legal defense team or his Sixth Amendment right to effective assistance of counsel.

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[22] As Milton wrote more than three hundred years ago, the publication that emerges comes to the reader or viewer "under the wardship of an overseeing fist." J. Milton, Areopagitica: A Speech for the Liberty of Unlicensed Printing to the Parliament of England, in *The Portable Milton* 151, 180 (D. Bush ed. 1949).

[23] If the suggestions are followed and no injunction issues, the censorship will almost certainly escape appellate review. *Cf. Goldblum*, 584 F.2d at 906 n.2.

[24] *See* V. Blasi, *Toward a Theory of Prior Restraint: The Central Linkage*, 66 Minn. L. Rev. 11, 80 (1982).

Governmental intrusions into private communications between criminal defendants and their lawyers can inhibit free exchanges between defendant and counsel, *Weatherford v. Bursey*, 429 U.S. 545, 554-55 n.4 (1977), and potentially jeopardize constitutional values. *Id.* at 562-63 (Marshall, J., dissenting).[25] They may, under certain circumstances, deprive defendants of their Sixth Amendment rights and require vacation of their convictions.[26]

Here, however, there is a serious question as to whether the attorney-client privilege has been waived. The court of appeals recognized that there was no showing in the district court that Noriega's attorney-client privilege was violated since, among other things, Noriega may well have waived his privilege so that "the privilege may not be assertable." CNN slip op. at 16.

Even if a showing had been made that the privilege had been preserved, Noriega's Sixth Amendment right to effective assistance of counsel or the attorney-client privilege has already been violated by the government's creation of the tapes, and that violation is already complete. The district court clearly acknowledged as much, stating that the interest in ensuring the confidentiality of these communications "has already been frustrated by the very fact of invasion [by the government]." Nov. 8 Order at 2-3. There is no evidentiary basis for a finding that publication would have any incremental effect whatsoever on the freedom with which Noriega will

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[25] Such intrusions can prejudice a defendant if information gained from the interference is used against him at trial. Prejudice can also result "from the prosecution's use of confidential information pertaining to the defense plans and strategy, from government influence which destroys the defendant's confidence in his attorney, and from other actions designed to give the prosecution an unfair advantage at trial." *United States v. Irwin*, 612 F.2d 1182, 1187 (9th Cir. 1980).

[26] *See id.* at 558; *Black v. United States*, 385 U.S. 26 (1966) (per curiam); *O'Brien v. United States*, 386 U.S. 345 (1967) (per curiam).

in the future discuss defense strategy and other issues with his counsel. Either the recording will cease, or continued recording—whether or not the recordings are published—will inhibit the defendant's communications. Publication of the tapes will also have no constitutionally significant impact on the steps necessary to protect Noreiga's Sixth Amendment right to effective assistance of counsel at his eventual trial. To the extent that the government, in creating the tapes, invaded Noriega's attorney-client privilege or violated his Sixth Amendment rights, protective steps will be required whether or not the tapes are published.[27] If the government is found to have acted improperly in creating the tapes, it will likely be required to show—by demonstrating lack of prosecutorial access, nonuse of the taped conversations, or otherwise—that there has been no prejudice to defendant Noriega.[28] Neither the district court nor the court of appeals cited any authority for the proposition that a private party's publication of the tapes would in any way preclude, or make more difficult or less effective, a later assertion by Noriega of the attorney-client privilege.[29] Surely a prior restraint cannot be justified, as the district court did, as merely a "symbolic and prophylactic" act.[30]

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[27] *Weatherford v. Bursey*, 429 U.S. at 554-56; *see, e.g., United States v. Kelly*, 790 F.2d 130, 136-38 (D.C. Cir. 1986); *United States v. Mastroianni*, 749 F.2d 900, 907-08 (1st Cir. 1984).

[28] Neither Noriega nor the government has questioned the scope of the district court's authority to impose procedural safeguards in the trial to preserve the privileged nature of Noriega's communications with his lawyers and to protect his Sixth Amendment right to counsel. Noriega, in fact, expressly recognized the district court's ability to fashion "appropriate relief" for any invasion of his Sixth Amendment rights. Mem. in Support of Injunction at 6 n.1.

[29] *Cf.* 18 U.S.C. § 2517(4) ("No otherwise privileged wire, oral, or electronic communication intercepted in accordance with, or in violation of, the provisions of this chapter shall lose its privileged character.").

[30] Nov. 8 Order at 3.

While the United States speaks of preserving defendant Noriega's right to a fair trial by the injunction,[31] it is obvious that the government supports the injunction as necessary to enable it to go forward with the prosecution. No case of which we are aware has authorized a prior restraint to protect the government's right to prosecute, to enhance its ability to prosecute, or to minimize the procedural hurdles which the government must overcome to present certain pieces of evidence in a criminal trial. Such a restraint would not be appropriate. The government's "right" to prosecute Noriega, of course, is not protected by the Bill of Rights, and the government has wholly failed to establish that an injunction for this purpose is necessary on the facts presented here.

Publication may, to be sure, give rise to an additional avenue of prosecutorial access to the conversations and information contained in the tapes. To that extent, it may impose an additional burden of rebuttal on the government.[32] But the potential additional burden of rebuttal which publication of the tapes might create for the government is a common problem. Evidence that originally came into existence or that came to light through some form of police or prosecutorial misconduct often is then widely disseminated in the media and through other means. Prosecutors have thus had extensive experience with the need to demonstrate that their evidence is not tainted by improper electronic surveillance,[33] by improper

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[31] Brief for the United States at 6, *Cable News Network, Inc. and Turner Broadcasting System, Inc. v. Manuel Antonio Noriega and the United States of America*, No. 90-5927 (11th Cir. Nov. 10, 1990).

[32] In this case, for example, in order to enhance its ability to show the absence of taint on the prosecution, the Department of Justice has apparently already taken steps to keep the prosecution team from hearing or reading news reports of the contents of the tapes, and the Department would be in a position to attest to that fact by affidavit in further judicial hearings on this question. Tr. 3-4 (Nov. 10, 1990 Hearing).

[33] *See Black*, 385 U.S. at 27-29 (1969); *Alderman v. United States*, 394 U.S. 165, 180-85 (1969); *Sinclair v. Schriber*, No. 89-

use of undercover agents,[34] by improper reliance on immunized testimony,[35] or by other types of police or prosecutorial misconduct.[36] And the courts have had correspondingly extensive experience in evaluating the sufficiency of the proof offered in such circumstances and deciding whether the prosecution's case is free from taint. The fact that the original source of the taint has become known to the public, through the media or otherwise, has never been thought to necessarily preclude prosecution, and the techniques employed by the prosecutors and courts to avoid the taint in these analogous situations are equally applicable here.[37]

There was no evidence—and no finding—that the judicious employment of such procedures by the prosecution and the district court would be insufficient to protect both the defendant's right to counsel and the possibility that the government could pursue its case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted, and the case should be set for expedited briefing and argument.

1875, slip op. (6th Cir. Oct. 23, 1990) (1990 U.S. App. LEXIS 18468); *Clark v. Wood*, 823 F.2d 1241, 1249-50 (8th Cir. 1987), *cert. denied*, 484 U.S. 945 (1987).

[34] *See Weatherford v. Bursey*, 429 U.S. at 554-56; *United States v. Ginsberg*, 758 F.2d 823, 833-34 (2d Cir. 1985).

[35] *See Kastigar v. United States*, 406 U.S. 441, 460-62 (1972); *Murphy v. Waterfront Comm'n of New York Harbor*, 378 U.S. 52, 79 & n.18 (1964); *United States v. North*, 910 F.2d 843, 853-55 (D.C. Cir. 1990).

[36] *See Segura v. United States*, 468 U.S. 796, 804-05 (1984); *Nix v. Williams*, 467 U.S. 431, 441-44 (1984); *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920).

[37] *See, e.g., United States v. Poindexter*, 698 F. Supp. 300, 312-13 (D.D.C. 1988); *United States v. North*, 910 F.2d at 855-56.

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Supreme Court, U.S.
FILED
NOV 17 1990
JOSEPH F. SPANIOL, JR.
CLERK

(5)

NO. 90-767

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

CABLE NEWS NETWORK, INC., and
TURNER BROADCASTING SYSTEM, INC.,
Petitioners,

v.

MANUEL ANTONIO NORIEGA and
UNITED STATES OF AMERICA,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MOTION FOR LEAVE TO FILE AND BRIEF AMICUS CURIAE OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF THE RESPONDENTS

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

National Association of Criminal Defense Lawyers, Inc. (NACDL) hereby respectfully moves for leave to file the attached amicus curiae in this case. Pursuant to Rule 37.2 of the Rules of this Court, amicus has been unable to obtain the written consent to the submission of this brief of all parties to this action due to the severe time constraints imposed for filings herein. Amicus has however, obtained consent of respondents.

The National Association of Criminal Defense Lawyers, Inc. (NACDL) is a District of Columbia non-profit cor-

poration with a membership of more than 5,000 lawyers and 25,000 affiliate members, including representatives of every state. NACDL was founded over twenty-five years ago to promote study and research in the field of criminal defense practice and to encourage the integrity, independence and expertise of defense lawyers.

Among NACDL's stated objectives is the promotion of the proper administration of criminal justice. Consequently, NACDL concerns itself with the protection of individual rights and the improvement of the criminal law, its practices and procedures. A cornerstone of this organization's objective, and of the criminal justice system, is the fundamental constitutional protection of an individual's fourth amendment rights. NACDL is very concerned about any decision that would undermine or dilute this constitutional guarantee, as would adoption of the position taken by the petitioners in the instant case.

The Amicus Curiae Committee for the NACDL has discussed this case and decided that the issues are of such importance to defense lawyers throughout the nation that NACDL should offer its assistance to the court.

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The brief is submitted on behalf of The National Association of Criminal Defense Lawyers.

INTERESTS OF AMICUS CURIAE

Pursuant to Rule 37.2 of the Rules of this Court, amicus has been unable to obtain the written consent to the submission of this brief of all parties to this action due to the severe time constraints for filings herein. Amicus has however, obtained the oral consent of respondents.

The National Association of Criminal Defense Lawyers, Inc. (NACDL) is a District of Columbia non-profit corporation with a membership of more than 5,000 lawyers and 25,000 affiliate members, including representatives from every state. NACDL was founded over twenty-five years ago to promote study and research in the field of criminal defense practice and to encourage the integrity, independence and expertise of defense lawyers. Amicus has a particular interest in preserving the confidentiality of attorney-client communications.

AN UNNECESSARY CONFLICT

Attorneys who represent individuals accused of crime are by their very nature sensitive to conflicts between competing interests within the Bill of Rights. This case presents a classic confrontation between a District Court's restraining order imposed to protect the vital constitutional rights of an accused, and the explicit constitutional command that the freedom to publish not be abridged.

But this is a conflict which never should have arisen. It would appear that here it is the Government, not the press, that is the real culprit for having invaded these privileged communications in the first place. Nevertheless, it is the publication of these confidential communications which poses the greatest threat to the rights of the accused.

SUMMARY OF ARGUMENT

AMICUS OPPOSES ANY STAY

Amicus urges this Court to deny Petitioner's Application to Stay the District Court's restraining order. For to permit publication of these confidences is to destroy them. To permit publication of these presumptively privileged communications without first affording the District Court an opportunity to review same, is to deprive that Court of any meaningful opportunity to weigh the competing interests between the accused, the press, and the public. And to grant a stay now, before this matter is heard, will permit dissemination to over 400 million viewers worldwide, effectively pretermitting any such determination by this Court as well.

ARGUMENT AND AUTHORITIES

OLDEST PRIVILEGE KNOWN TO LAW

The attorney-client privilege, which can trace its roots back to ancient Rome,[1] has been described by this Court as "the oldest of the privileges for confidential communications known to the common law", *Upjohn Co. v. United States,* 449 U.S. 83, 66 L.Ed.2d 584, 591, 101 S.Ct. 677 (1980).

> "The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law. . . . Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice. The privilege recognizes that sound legal

1. See: Radin, *The Privilege of Confidential Communications Between Lawyer and Client,* 16 Cal. L. Rev. 487 (1928).

> advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer being fully informed by the client."

The attorney-client privilege, the Sixth Amendment right to "effective assistance" of counsel, and the Fifth Amendment right to a fair trial are all inextricably intertwined. Without the ability to communicate and seek advice of one's counsel in confidence there can be no effective assistance.

Where a presumptively innocent accused is detained without bail, his inability to seek and obtain legal advice in confidence affects the fairness of those proceedings. Depending upon the substance of Noriega's discussions with his counsel, the publication and disclosure of the contents of those tape recordings may prevent any prosecution at all.

DISTRICT COURT DEPRIVED OF OPPORTUNITY FOR MEANINGFUL REVIEW

Yet here the Petitioners seek to publish tape recordings of acknowledged attorney-client communications without affording the District Court an opportunity to determine their privileged nature, or the impact such publication would have upon the individual's rights.

> "Thus, the court was in effect being asked to make a factual determination without being allowed to review the facts. On this point, it is important to note that CNN is in possession of the tapes, and has resisted turning them over to the court for review. It seems fundamentally unfair to allow CNN to benefit from its refusal to disclose the contents of the tapes to the court—that is, to allow CNN to argue that no prior restraint should issue because no clear and immediate harm is apparent when the only reason that

no clear and immediate harm yet appears is because CNN has so far prevented this court from reviewing the content of the tapes in its possession." Supplemental Order entered in *U.S. v. Noriega,* No. 88-0079-CR-Hoeveler on November 9, 1990.

As the Eleventh Circuit noted:

"CNN has shackled the District Court by refusing that court's reasonable request to review the audio tapes it has in its possession and which CNN desires to broadcast. While appealing to our nation's judicial system for relief, CNN is at the same time defiant of that system's reasonable directions. . . .

The District Court must possess the subject tapes in order to make its *in camera* determination of whether the attorney-client communications are privileged. We are troubled by CNN's refusal to obey the District Court's order to release the tapes in question to the court." *In re Cable News Network and Turner Broadcasting System, Inc.,* ____F.2d____, No. 90-0832 (11th Cir. November 10, 1990).

STAY WOULD EFFECTIVELY PRECLUDE REVIEW BY THIS COURT AS WELL

Now Petitioners seek a stay from this Court permitting dissemination of these presumptively privileged communications[2] to over 400 million viewers worldwide, pretermitting any meaningful review or consideration of the rights of the accused.

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2. The trial court specifically found that the attorney client privilege had been violated:

"Defendant characterizes the issue as a violation of the attorney-client privilege. To be sure, there is no question that such a violation had occurred. CNN concedes that the tapes contain communication between Noriega and his lawyers or staff, and there is no indication that the attorney-client privilege was waived" *See* Order entered by Judge Hoeveler, November 8, 1990 Petitioner's Appendix p. 22a.

STANDARD OF REVIEW

The decision as to whether to grant injunctive relief rests within the sound discretion of the trial court. *Nixon v. Warner Communications,* 435 U.S. 589, 55 L.Ed.2d 570, 98 S.Ct. 1306 (1978); *Belo Broadcasting Corp. v. Clark,* 654 F.2d 432 (5th Cir. 1981). *See also U.S. v. Columbia Broadcasting System, Inc.,* 497 F.2d 102 (5th Cir. 1974) [trial court has broad discretion to regulate matters affecting the trial process]; *U.S. v. Schiavo,* 504 F.2d 1 (3rd Cir. 1974). Furthermore, this Court has recognized the trial court's "affirmative constitutional duty" to ensure a fair trial by "minimiz[ing] the effects of pre-trial prejudicial publicity". *Gannett Co. v. DePasquale,* 443 U.S. 368, 378, 99 S.Ct. 2898, 2904, 61 L.Ed.2d 608 (1979). Absent an abuse of that discretion, the District Court's decision should not be disturbed.

> "In urging reversal of the district court's determination that Moore's rights would be compromised by access to the tapes, the appellants would have us say that the trial court must have positive proof of the impossibility of assuring defendant a fair trial before access may be denied. A forecast of future difficulty is by definition uncertain, but equally uncertain is the rejection of that forecast. *Speculative dismissal by an appellate court of a trial judge's admittedly uncertain but quite reasonable prognostication only compounds the problem. The informed and considered judgment of the trial judge should prevail in any choice between such equally speculative results. It is better to err, if err we must, on the side of generosity in the protection of a defendant's right to a fair trial before an impartial jury.*" (emphasis supplied) *Belo Broadcasting Corp. v. Clark,* 654 F.2d 423, 431 (1981).

By depriving the District Court access to the tapes below the Petitioners effectively precluded any meaningful determination of these competing interests.

By seeking permission to publish those tapes before this case is heard, Petitioners wish to deprive this Court of that opportunity as well.

As the Second Circuit points out in *Application of Dow Jones & Co., Inc.*, 842 F.2d 603, 609 (2nd Cir.), *cert. denied*, 488 U.S. 946, 102 L.Ed.2d 365, 109 S.Ct. 377 (1988):

> "When the exercise of free press rights actually tramples upon Sixth Amendment rights, the former must nonetheless yield to the latter."

If contractual rights and "the appearance of confidentiality so essential to the effective operation of our foreign intelligence services" may take precedence over the right to publish See: *Snepp v. United States*, 444 U.S. 507, 62 L.Ed.2d 704, 100 S.Ct. 763 (1980), then surely maintaining the confidences so essential to obtaining the assistance of counsel would as well.

If one's "ability to earn a living as an entertainer" has been held to have prominence over a television station's First Amendment right to broadcast, See: *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 53 L.Ed. 965, 97 S.Ct. 2849 (1977), then surely the threat to an accused's liberty should carry equal weight.

If "[t]he first amendment is not a license to trample on legally recognized rights in intellectual property", See: *Dallas Cowboys Cheerleaders v. Scoreboard Posters, Inc.*,

600 F.2d 1184, 1188 (5th Cir. 1979), then surely it is not a ticket to "trample on legally recognized rights" of the criminally accused, where more than one's "intellect" is at stake.

> "In our nation, the courts are charged with safeguarding a defendant's right to a fair trial and with cautiously balancing First Amendment and Sixth Amendment interests. 'It is not asking too much to suggest that those who exercise First Amendment rights in newspapers or broadcasting enterprises direct some effort to protect the rights of an accused to a fair trial . . .' " *In re Cable News Network, Inc. and Turner Broadcasting System, Inc.*, ____F.2d____, No. 90-9832 (11th Cir. November 10, 1990), *citing, Nebraska Press Ass'n*, 427 U.S. 539, 560, 49 L.Ed. 2d 683, 96 S.Ct. 2791 (1976).

At the very least, First Amendment concerns could await proper review by this Court.

CONCLUSION

Petitioner's Application for Stay should be denied.

Respectfully submitted,

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BRIEF AMICUS CURIAE OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF THE RESPONDENTS

CERTIFICATE OF SERVICE

I, Gerald H. Goldstein, a member of the Bar of this Court, hereby certify that on this 17th day of November,

1990, one copy of the Brief Amicus Curiae of the National Association of Criminal Defense Lawyers in the above entitled case was served by mail and by fax upon Frank A. Rubino, Esq., 2601 S. Bayshore Dr., Suite 1400, Coconut Grove, Fla. 33133, Counsel for the respondent Noriega herein, and upon Terry S. Beinstock, Esq., and Dan Waggoner, Esq., (by fax only) Suite 3160, S.E. Financial Center, 200 So. Biscayne Blvd., Miami, FL 33131, counsel for the petitioners Cable News Network and Turner Broadcasting, Inc. herein, and upon Dean I. Ringel, Esq., 80 Pine Street, New York, NY 10005, and upon Dexter W. Lehtinene, Esq., United States Attorney, 155 S. Miami Ave., Miami, Fla. 33130, counsel for the respondent United States of America herein, and upon the Solicitor General, Department of Justice, Washington, D.C. 20530. I further certify that all parties required to be served have been served.

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FILED
NOV 16 1990
JOSEPH F. SPANIOL, JR.
CLERK

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SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI AND APPLICATION TO STAY DISTRICT COURT RESTRAINING ORDERS PENDING CERTIORARI

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 88-79-CR-HOEVELER

Tuesday, November 13, 1990
Miami, Florida
3:40 p.m.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MANUEL ANTONIO NORIEGA, et al.,

Defendants.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE WILLIAM H. HOEVELER

(In Chambers)

APPEARANCES:

(As heretofore stated.)

Court Reporter: Barbara Medina
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(Call to order of the Court.)

MR. SHEEHE: I am Phil Sheehe. Terry is in California. I was sent over here. CNN's appellate counsel wants to be

involved because, obviously, this hearing has to do with the record.

THE COURT: This is their number.

What happened to Maria?

MR. LEWIS: She is out there turning them away at the door.

MR. RUBINO: I'll sit on your lap.

MR. LEWIS: Better that way than the other way.

THE COURT: This is just a friendly informal conference, but everything we do is —

MR. MAY: Headline news.

THE COURT: — headline news.

She is going to get your appellate counsel.

MR SHEEHE: Yes.

THE COURT: That's what this is about. It's appropriate he be in on it.

You have, Mr. Rubino, do you have an investigator by the name — there he is. You are Mr. Fernandez.

MR. FERNANDEZ: Yes, sir.

THE COURT: This, of course, is in my favorite case.

THE DEPUTY CLERK: On your line 79.

THE COURT: Hello.

MR. DALTON: Hello. Good afternoon, Your Honor.

THE COURT: Good afternoon. How are you doing?

MR. DALTON: This is Jack Dalton.

THE COURT: Yes, sir.

Hello. Hello.

MR. SHEEHE: That was Jack Dalton.

THE COURT: Jack left.

The line is still open.

MR. SHEEHE: They are blaming you, Judge.

THE COURT: I think Jack cut himself off.

MR. SHEEHE: We will stipulate to that.

THE LAW CLERK: They lost him. They are going to get him again.

THE COURT: I will give you a little introductory as to why we are here so we can spend less time on it.

I want to address this, particularly to the Government, because I don't want to do anything that anybody doesn't think is entirely appropriate.

I got to thinking about the record before the Court of Appeals and that which will go —

MS. KENDRALL: They are on line 1 now, Judge.

THE COURT: Line 1?

Hello. We have Mr. Dalton again?

MR. DALTON: Yes, Your Honor.

THE COURT: Very good.

Now, I have with me counsel for the Government, defense counsel and your local counsel, together with some representatives of the press. We are in Chambers and I hope you can hear me adequately.

MR. DALTON: Yes, Your Honor, we can.

THE COURT: All right. Fine.

I am going to do most of the talking, although I am going to ask the Government some questions.

The purpose of this meeting — and I really intended it to be very brief — is that I am supplementing the record before the Court of Appeals because I want this record also to go to the Supreme Court of the United States, and the way I am supplementing the record is I am sending transcripts of all hearings that we have had in this matter.

They are being faxed to the Court of Appeals this afternoon, plus I am, I propose to send a record of all of the telephone conversations in which General Noriega and his counsel or representatives of his counsel were involved to the Court of appeals also.

This record I had when I was considering these portions of this matter, and I think it proper that the Court of Appeals have it, and I think it proper that the Supreme Court of the United States have it.

Now, before you comment on it, I am going to ask the Government, is there any objection to my doing that?

MS. COHEN: Your Honor, as long as this remains under seal.

MR. DALTON: Your Honor, we are not able to hear that in Atlanta.

THE COURT: Ms. Cohen says as long as it remains under seal. That is, I mean, as long as it is not disclosed to the press?

MS. COHEN: Or to the other parties, Your Honor. This was submitted under seal.

THE COURT: This was submitted under seal. It's something, though, that I had and that I considered, and I think that the Court of Appeals should have it, and I think the Supreme Court should have it.

And your position is that while you have no objection to it going forward to the Court of Appeals, it should remain under seal?

MS. COHEN: Yes. It is part of the record. That's the way it was presented and we would ask that it remain under the same conditions under which it was presented.

THE COURT: Ms. Cohen says it was part of the record. That's the way it was presented. It was considered under seal and she asks it remain under seal.

I can understand that because we may be compounding the problems that we have already had as a result of these disclosures.

But I did want you to know what I was doing and the circumstances under which I was doing it, because you have a right to know whatever is in the record.

Now, let me ask your local counsel, do they have any position on this?

MR. SHEEHE: Your Honor, I think we need to defer to our appellate counsel. That's why we have them on the line.

THE COURT: Local counsel is deferring to Atlanta counsel.

MR. DALTON: Yes, Your Honor. This is Jack Dalton again.

We have some question — I wonder what the position of General Noriega's counsel is.

MR. RUBINO: Your Honor, first of —

THE COURT: Come over here, would you please, Frank?

MR. RUBINO: This is Frank Rubino.

My first question would be what is the Government submitting under, that they wish under seal? I don't know what we are talking about.

THE COURT: I am going to show you just a portion of it without going into detail, but I do want you to know what we are talking about.

MR. RUBINO: Okay. I know what that is.

THE COURT: It's a log. That's all it is.

MR. RUBINO: Just a pure log.

THE COURT: Pure log. It shows the number of calls and to whom they were made.

MR. RUBINO: Fine. Okay.

He knows what we are talking about now.

THE COURT: Yes.

MR. RUBINO: I didn't, I didn't know what it was. Now I am aware of it.

MR. DALTON: Could you describe it for us here in Atlanta, Mr. Rubino?

MR. RUBINO: I prefer the Judge do that.

THE COURT: It's a log on legal size paper and it has a list of the telephone calls, to whom they were made, when they were made, and the numbers involved and, apparently, a supervisor of some kind signing for them, and the hours and the day on which there were made.

MR. DALTON: Your Honor, does it disclose who made it or are you able to —

THE COURT: I assume these were all made by the defendant.

MR. DALTON: No, I mean who made the log.

THE COURT: No, it does not.

MR. RUBINO: If I may, I think it does.

THE COURT: Well —

MR. RUBINO: The guard who wrote it.

THE COURT: It discloses who apparently supervised the calls.

Who keeps track of the log —

MR. RUBINO: The guard.

THE COURT: Who keeps track of it, I don't know.

MR. DALTON: It's a Government document.

THE COURT: Beside each call there is a name that is out on the border and I presume it's the name of the person who monitored the call.

MR. DALTON: And was maintained by the Government?

THE COURT: Oh, yes.

MR. DALTON: And this was, if I may ask, produced to Your Honor when?

MR. MOSCOWITZ: It was late last week.

THE COURT: Sometime about the time all these events started.

MR. SHEEHE: Friday.

THE COURT: I can't give you the exact day.

Is Joan here?

Do you remember when I got this?

MS. KENDRALL: Probably, most likely, Friday.

MR. DALTON: That has not been made available to the defendant either?

THE COURT: It has not been made available to anybody.

MR. MAY: The Court made reference to it in a number of the hearings.

THE COURT: I did make reference to it during the hearings —

MR. DALTON: Yes, sir.

THE COURT: — when I suggested there were quit a number — I think I suggested there were quite a number of calls.

MR. RUBINO: To answer Mr. Dalton's question, we would have no objection.

MR. DALTON: Your Honor, we would object — and to the degree that it's to be sealed — because CNN is in favor of public disclosure of all information in the possession of the Government.

THE COURT: I am aware of that.

MR. DALTON: Yes, sir.

THE COURT: I am going to go ahead and transmit this to the Court of Appeals under seal.

You, of course, can make whatever applications you might wish to, either to the Court of Appeals or the Supreme Court.

MR. PEARSON: Your Honor, this is Stuart Pearson with Mr. Dalton.

THE COURT: Yes, sir?

MR. PEARSON: Might I ask the Court to give us a time frame within which this log covers, so that we might be able to explain to the Court of Appeals its relevance?

MS. COHEN: Your Honor, I would object.

THE COURT: That's objected to by the Government. That's objected to.

I will sustain the objection at the moment.

You see, there are a variety of reasons why I think this should go up. I won't go into them all.

One of them is that I had it, that I considered it, and I think it's pertinent, and if the Court of Appeals thinks you ought to have it, or the Supreme Court thinks you ought to have it, I am sure you will have it.

But this whole event has happened so quickly and there have been so many things done and so many hearings had, that I think it's only fair that the Court of Appeals, as well as the Supreme Court, have everything that I had and can consider everything that I considered in reaching their opinion.

Frankly, I think this is relevant to the principal issue in the case, and that is obviously the, the question of the amount of time that would have been necessary to have determined the factual issues in the case if, indeed, I had been given the opportunity to consider those factual issues in the first instance.

I think you probably follow what I am saying.

MR. PEARSON: Your Honor, my reason for asking was directly to that point.

During the hearings, as I recall, you indicated there were potentially hundreds of taped conversations going all the way back to early 1990, and my only reason for asking was to

determine whether or not this supplement of the record establishes that that is so.

MS. COHEN: Your Honor, if I may address that on behalf of the Government?

We are now —

THE COURT: Come on over here. Ms. Cohen is speaking now.

MS. COHEN: Marcella Cohen, on behalf of the Government.

With regard to this sealed document, I know much has been discussed already, and if we are not going to keep it under seal, that's one thing. If we are, that's quite another.

I think to disclose more than we have already is really getting into more of the substance and we would object to further information being disclosed that's currently under seal.

MR. MOSCOWITZ: This inquiry was not made by CNN or the other parties before this Court. I see no reason why they should now be entitled to further inquiry at the appellate level.

MR. DALTON: Can't hear, Your Honor.

THE COURT: Say that again.

MR. MOSCOWITZ: These questions were not raised by CNN or the other parties before this Court. I see no reason why they should be entitled to this further information at the appellate level.

THE COURT: What Mr. Moscowitz is suggesting, and I think it has merit, is even after I disclosed that I had this record and that it was, I think, I suggested that it was a voluminous record, no demand or inquiry or interest was shown in it relative to the particular point involved and that's a fair point.

So I think —

MR. DALTON: You Honor, if I understand the Government's statement from Ms. Cohen, our request to verify or be given the time frame or the number of conversations recorded is not going to be done because the Court will, will sustain the Government's objection?

THE COURT: Well —

MR. DALTON: My difficulty, Your Honor, is that I understand the Court's position, that it would be extremely time consuming and difficult to go through the analysis of all of these tapes, but we don't know, for argument purposes in this Court, the Court of Appeals or the Supreme Court what the dimensions are in time and number, and all we are asking for is the number and the time frame.

MR. RUBINO: If I may join in the Government's objection.

It seems that CNN now is being heard to argue the same position they put the Court in last week by refusing to go let the Court hear the tapes and know, so now we have no objection.

We join the Government. We think the Court used this in some respect, aiding and assisting the Court in making a ruling. We think it is imperative the Appellate Court, unlike the District Court, gets all they can to help them make a decision.

THE COURT: Let me say I really didn't need this to make my decision, but I think the volume — and I will go that far — the volume in question makes apparent the correctness of the Court's position on the issue involved, which I am not sure everybody really understands yet — that is, going up — the issue being whether or not the network can shift to the Court

and to the other parties, when it is impossible to do so, the burden of making a factual determination of the information held by the network, and this piece of evidence I think is very germane to showing that that would have been a physical impossibility under the circumstances presented to the Court.

It does cover an extensive period of time. I will go that far with you.

MR. CUNNINGHAM: Your Honor, if I may, James Cunningham for CNN.

I think the record does reflect that CNN has filed a motion for access to that log and that motion still remains pending before the Court.

MR. DALTON: Your Honor — this is Dalton in Atlanta again — it appears at page 12 of the record, beginning at page 11, when Mr. Bienstock at line 16, "On behalf of Cable News Network, we seek access to that information and I have a motion for an Order to the Clerk of the Court directing access with a supporting memorandum," in response to the Government having produced some documents concerning the tapes to the Court.

THE COURT: Well, I am going to take this position with all respect to your position: I am going to deny that motion.

I am concerned, I might say, because of what has happened relative to CNN up to this point. I want you to know what we are doing. I want you to know what's going up.

If the Court of Appeals or the Supreme Court feels that you should have this then, of course, they will control the situation and I am sure if they feel that you should have it, we will give it to you.

But it's important that the Appellate Courts know the dimension of the problem, and I think this will give them a

good idea of it. I think you probably have a pretty good idea of the dimensions of the problem already from what I have said.

More than that, I really can't say at the moment. I simply wanted you all to know — by "you all," I mean all counsel — to know that the record is being supplemented with this log and also with a transcript of all of the hearings that have been held, and I think in all fairness, the transcript of this hearing as well should go up, do you not?

MR. PEARSON: Yes, Your Honor.

MR. DALTON: Yes, sir, and the one from yesterday as well, but I understood Your Honor to say earlier that that would be included.

THE COURT: I think they all should go up. I think they ought to have a complete picture of every step that has been taken in this process.

MR. DALTON: Your Honor, do you know when the transcripts, including this one, will go to the Court of Appeals?

THE COURT: They are in the process right now. The transcripts, I think, have already gone up.

THE LAW CLERK: Everything except yesterday and today.

THE COURT: All —

MR. DALTON: Including this hearing?

THE COURT: No, we are not that fast.

All of the transcripts have gone up.

THE LAW CLERK: Except yesterday and this.

THE COURT: That will go up when we get it. This log will go up as soon as we are finished.

Then I will have our Court Reporter, as soon as she can get it together, do this one and we will send this one up, and that I think will complete the record.

MR. PEARSON: Your Honor, might I ask a technical matter? This Stuart Pearson for CNN.

As we understand your written order, the Temporary Restraining Order is specified to expire by its terms on Monday, the 19th.

THE COURT: Well, now, hold the phone. We had an agreement yesterday and I thought that was very clear.

MR. DALTON: We just want to make sure, Your Honor, that as part of the Order yesterday, the Temporary Restraining Order is extended beyond Monday.

THE COURT: Of course, but it's extended because of your agreement.

Normally, a Temporary Restraining Order lasts for only ten days unless it's extended by the Court and the parties, by agreement of the parties for an additional ten days.

Now, in this case, as we are not really dealing with a civil Temporary Restraining Order any longer, it occurs to me that what we have is an agreement that there shall be no action taken by any of the parties until the Supreme Court has spoken on the subject.

Did I understand that correctly?

MR. DALTON: Well, close, Your Honor, but not quite.

Our position is that we are under a Court Order restraining us from telecasting any privileged attorney-client communications between Mr. Noriega, General Noriega and his lawyers, and we have agreed to obey that Order unless and until we obtain relief from the Supreme Court.

It was our understanding, however, that the Court made it clear that the Order was and would be extended.

We did not agree to the extension of the order.

THE COURT: Would you explain to me what that means?

MR. DALTON: We agreed to obey your Order but not to its extension.

THE COURT: I don't follow you.

Are you telling me that you are going to publish these tapes?

MR. DALTON: No, no, no, we are not. We are going to comply with your Order.

We just want to make certain that when Monday comes around, your Order is still in being, then and beyond.

THE COURT: It seems to me it's in being by agreement.

MR. DALTON: Well, that's part of the problem we have, Your Honor.

We did not agree to the Order. We agreed to obey it, which we will do.

MR. RUBINO: Whoa —

THE COURT: I wonder if we are not drawing distinctions that have no differences.

MR. DALTON: Well, Your Honor, let me see if I can put it this way: There have been indications that after you issued your Order, CNN disobeyed it.

THE COURT: Yes.

MR. DALTON: If you had issued your Order and CNN had not made a further telecast, there would not be any indication of disobeying it.

THE COURT: That's true.

MR. DALTON: But we did not agree to the Order itself. We would only have agreed to obey it. That's the distinction that I make here, the distinction between your issuance of the Order and its existence as an obligation issuing from the Court on the one hand and CNN's response to it by obeying it or disobeying it on the other.

What we have agreed to do is to obey it until and unless we obtain relief from the Supreme Court. We have not agreed that the Order should issue or that it should be extended.

We have presumed that the Court has extended it for the length of time within which we would obtain relief or not in the Supreme Court.

THE COURT: I think I understand what you are saying. What you are saying is you don't wish to waive any positions previously taken.

Is that it?

MR. DALTON: We don't want to waive any objection to the issuance or extension of the Order.

THE COURT: Well, I don't think you have.

You mean by agreeing to the extension, you don't want to agree it was originally correct.

MR. DALTON: Or that its extension is proper.

THE COURT: I think I understand.

MR. MOSCOWITZ: May I just raise one question? I was listening very carefully to counsel's summary of what the agreement was. There was one thing he said that may have been an error, but I want to clarify it.

He said they agreed not to broadcast any privileged attorney-client communications. We sought to clarify —

MR. DALTON: I can't hear. I'm sorry.

THE COURT: Come over here, Norman.

MR. MOSCOWITZ: What I heard you to say the agreement was that you have agreed not to broadcast any privileged attorney-client communications.

Everyone was very careful yesterday to clarify it, that what you were agreeing to was not to broadcast any attorney-client communications without making the Judge aware, the judgment, whether or not, in fact, they are privileged.

MR. DALTON: That's correct.

MR. RUBINO: We are halfway there.

I have another problem in understanding what you have just posed to Judge Hoeveler.

This is Frank Rubino.

I well appreciate you don't want to waive any rights you may have, but it would be my posture that Judge Hoeveler's Order is still in good, in full force and effect until overturned by the Supreme Court.

Otherwise, this could moot this entire issue. If we have some agreement — which we refuse to make — the Order is no longer in effect, but you are just doing this voluntarily —

MR. DALTON: Let me try to state it again.

MR. RUBINO: We have to be appealing an Order. We can't appeal your voluntary agreement to something that's no longer in effect.

MR. DALTON: That's correct.

The Order stated by its terms, consistent with Rule 65, the Temporary Restraining Order would last for only ten days.

Our concern was the record did not reflect clearly that the Court had extended the Order until the Supreme Court should act.

What we have agreed to do is obey that Order. What we want to be certain of is that the record is clear that the Order continues.

THE COURT: The Order does continue.

MR. RUBINO: Fine.

THE COURT: It continues as per the agreement of yesterday, and that is it's in effect until such time as the Supreme Court acts.

MR. DALTON: And CNN has not waived objection to its issuance.

THE COURT: Of course not. That's why you are appealing.

MR. DALTON: Or to its extension.

THE COURT: You have agreed to the extension without waiving the original objection.

MR. DALTON: This may be splitting hairs, Your Honor. We just want to make it clear the continuing prior restraint is what we object to.

Is that clear?

THE COURT: Yes of course. That's the whole issue.

MR. RUBINO: One last thing: As part of the agreement — we forgot to put this on, but this should please you to hear — This is Frank Rubino again — I understand it was part of the agreement yesterday that we would not have the contempt

hearing, and we would like to notify you as part of the agreement we will also not at this time file a criminal contempt request before the Court, but will hold that until after the Supreme Court rules also.

THE COURT: Did your hear that?

MR. PEARSON: We heard it.

MR. DALTON: We heard it, Your Honor.

THE COURT: All right.

And I am still waiting for you to get back to me on the alternatives I suggested yesterday. There is no time frame necessarily, but you let me know when you have considered your options.

MR. DALTON: Your Honor, we thought a letter was delivered to you this morning in response to that. If you give me a minute I'll find a copy of it.

THE COURT: All right.

MR. DALTON: Terry's letter, from Mr. Bienstock's office.

THE COURT: If it was, I don't have it yet.

MR. CUNNINGHAM: The Court does not have it yet, but it's in Miami.

You will have it before the close of business today.

MR. DALTON: We declined that, Your Honor, and in the letter we also advised the Court of the contact at the United States Supreme Court, as we were directed to do.

THE COURT: Good. All right. Then we will proceed as indicated.

MR. DALTON: Yes, sir.

THE COURT: Anything further?

MR. DALTON: Thank you. We appreciate your keeping us advised, Your Honor.

THE COURT: No problem. Thank you, and I will tune you out now.

MR. DALTON: Thank you.

MR. CUNNINGHAM: Your Honor, the letter is in Miami. As soon as I get back we will finalize the letter and do a notice of filing for you.

THE COURT: I think that's probably the best way to handle it.

MR. CUNNINGHAM: Yes.

THE COURT: Keep it clean.

MR. CUNNINGHAM: We want everything to be above-board and correct in the record.

THE COURT: I will go entirely along with that, but, certainly, we will have a clear fish for the Supreme Court.

MR. RUBINO: Am I to assume you have not applied for an emergency stay?

MR. CUNNINGHAM: I am not aware that one has been applied for. That's all I can say. I am not aware of it.

MR. MAY: My understanding, from our prior conversations, is that you will be filing your cert. petition by Thursday?

MR. CUNNINGHAM: We will, as best I know, be filing with the Court by Thursday.

THE COURT: Is there anything further that anyone would like to take up?

MR. RUBINO: There is one other thing we would like to know, Your Honor. We can do it by an oral motion at this time and supplement the record with a written motion later.

We would like to know how many times CNN has, in fact, aired those tapes since the Court's Order.

MR. SHEEHE: There is nobody here that can tell you the answer to that.

MR. CUNNINGHAM: The only thing we can do at this point, Your Honor — I don't personally have that information — is if they file a motion, we can take whatever action is appropriate after filing the motion.

THE COURT: I don't think there is any need for that until sometime after the Supreme Court has ruled because that matter will come up, in any event, regardless of the Court's ruling, at which time you can do such discovery as you think is indicated.

MR. RUBINO: Yes, sir.

THE COURT: All right.

If there is nothing further, I have another matter that I have got to take care of.

(Proceedings concluded.)

I hereby certify that the foregoing
is a true and correct transcript of
the proceedings in the above matter.

_____ _____

Date Official Court Reporter

526 MIRANDA: ORDER (WMH 11/6/90) CLARIFYING Court's prot order of 8/15/90 & same remains in effect (EOD 11/8/90-CCAP).

527 MIRANDA: ORDER (WMH 11/6/90) THAT deft's M/discl of specific disc filed 2/12/90 was denied w/o prej by Mag Turnoff 7/20/90 & is not pending mot (EOD 11/8/90-CCAP).

528 NORIEGA: ORDER (WMH 11/6/90) THAT written notice be given CSO no later than 5pm 11/26/90, as to all classified info that deft expects to discl (EOD 11/8/90-CCAP).

529 ALL DEFTS: NOTICE (WMH — no date) RESCHEDULING hrg for 11/13/90 at 10 am (EOD 11/9/90-CCAP).

530 NORIEGA: ORDER (WMH 11/8/90) CONTINUING temp inj imposed on CNN until such time as Court can review contents of tapes in CNN's poss. CNN to prod copies of tapes in its poss (EOD 11/9/90-CCAP).

531 NORIEGA: *NOTICE OF APPEAL* by Turner Broadcast & CNN from order granting TRO entered 11/9/90. Copies to USCA & Attys of record. No fee paid.

532 NORIEGA: NOTICE of hrg set for 11/8/90 @ 8:30 am, by deft.

533 NORIEGA: MOTION for injunction, by deft.

534 NORIEGA: MEMO in supp of mot/injunction prohibiting release of privileged communication, by deft.

535 NORIEGA: BRIEF in opp to mot/injunction, by Turner Broadcasting & CNN.

536 NORIEGA: SUPPLEMENTAL ORDER (WMH 11/9/90) to court's order of 11/8/90 will remain for up til 10 days. (EOD 11/9/90) CCAP.

537 NORIEGA: *NOTICE OF APPEAL* by Turner Broadcasting & CNN from supplemental order entered 11/9/90. Copies to USCA & Attys of record. Fee paid 110747.

538 NORIEGA: TRANSCRIPT of hrg., before Judge William M. Hoeveler on 11/8/90 & 11/9/90 pgs. 3-134.

539 NORIEGA: TRANSCRIPT of hrg., on 11/10/90 before Judge William M. Hoeveler pgs 3-22.

540 ALL DEFTS: NOTICE of filing letter, by CNN & TBS.

541 MIRANDA: ORDER (WMH-11/7/90) no classified docs shall be discl to persons, incl defenses csl, who have not obtained security clearance (EOD-11/14/90-CCAP).

542 ALL DEFTS: ORDER (WMH-11/8/90) Setting hrg on pending matters & mots for 11/13/90 at 10:00 (EOD-11/14/90-CCAP).

543 NORIEGA: NOTICE of filling transcript of hrg, by CNN & TBS.

544 NORIEGA: TRANSCRIPT of hrg 11/12/90 pgs. 1-33.

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No. 90-767

IN THE SUPREME COURT
OF THE UNITED STATES OF AMERICA

October Term, 1990

CABLE NEWS NETWORK, INC., and
TURNER BROADCASTING SYSTEM, INC.,
Petitioners,

v.

MANUEL ANTONIO NORIEGA and
UNITED STATES OF AMERICA,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI AND APPLICATION TO STAY DISTRICT COURT RESTRAINING ORDERS PENDING CERTIORARI

CERTIFICATE OF SERVICE

I, P. Cameron DeVore, a member of the Bar of this Court, hereby certify that on this 16th day of November, 1990, three copies of the Supplemental Appendix to Petition for Writ of Certiorari and Application to Stay District Court Restraining Orders pending Certiorari in the above-entitled case were personally served upon Frank A. Rubino, Esq., 2601 S. Bayshore Drive, Suite 1400, Coconut Grove, FL 33133, counsel for the respondent Noriega herein, and upon Dexter W. Lehtinen, Esq., United States Attorney, and Myles Malman, Esq., Assistant United States Attorney, 155 S. Miami Avenue, Miami, FL

33130, counsel for the respondent United States of America, herein, and upon the Solicitor General, Department of Justice, Washington, D.C. 20530. I further certify that all parties required to be served have been served.

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Counsel of Record for Petitioners

Supreme Court, U.S.
FILED
NOV 17 1990
JOSEPH F. SPANIOL, JR.
CLERK

(8)

Nos. A-370 & 90-767

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

CABLE NEWS NETWORK, INC., *et al.*,

Petitioners,

—v.—

MANUEL ANTONIO NORIEGA and
UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR A WRIT OF *CERTIORARI* TO THE
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF PETITIONERS' APPLICATION FOR A STAY AND PETITION FOR *CERTIORARI*

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INTEREST OF AMICUS[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with over 275,000 members dedicated to preserving the principles embodied in the Bill of Rights. In pursuit of that goal, the ACLU has participated in virtually every major free speech controversy decided by this Court during the past half-century, including such prior restraint cases as *Nebraska Press Ass'n v. Stuart*, 427 U.S 539 (1976), and *New York Times Co. v. United States*, 403 U.S. 713 (1971). This case involves yet another prior restraint. The issues it raises are therefore directly related to the central organizational concerns of the ACLU.

INTRODUCTORY STATEMENT

Amicus curiae respectfully prays that the Court act forthwith to remove existing legal obstacles to the publication or broadcast of conversations between Gen. Manuel Noriega and members of his defense team contained on tape recordings in the possession of Cable News Network (CNN). *Amicus* understands that the recordings were made by agents of the United States government, arguably in violation of General Noriega's Sixth Amendment right to counsel. General Noriega has succeeded in persuading the lower courts to enter prior restraints against the publication or broadcast of the tapes by CNN.

Where, as here, a speaker has been enjoined from broadcasting material that arguably implicates the government in wrongdoing, and where the interests asserted

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[1] Letters of consent from petitioners and respondent United States are being lodged with the Clerk of the Court along with this brief. Due to the expedited briefing schedule, counsel for respondent Noriega has provided his oral consent and represented to counsel for *amicus* that he would expeditiously file an appropriate consent letter.

in support of the prior restraint manifestly fail to satisfy the extremely stringent standards governing the issuance of a prior restraint, this Court should act immediately to remove the ban.

In its present posture, this case involves only the issue of a prior restraint. It does not involve the question of whether CNN in fact violated the district court's order and, if so, what consequences should follow from that disobedience. The question of CNN's possible contempt has not been resolved in the lower courts and is not before this Court. Likewise, the facts of this case make it unnecessary to decide whether the press can *ever* be required to turn over materials in its possession in order to facilitate a judicial balancing of interests. Before any such burden can even be contemplated, the moving party must articulate some specific grounds for believing that the stringent standards for a prior restraint can be met. Here, General Noriega has offered nothing more than plainly inadequate conclusory assertions. Moreover, even a worst-case scenario would not justify a prior restraint under this Court's decision in *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539.

ARGUMENT

THE PRIOR RESTRAINT ISSUED BY THE TRIAL COURT VIOLATES THE FIRST AMENDMENT

A. The Constitutional Ban on Prior Restraints

Since this Court's decision in *Near v. Minnesota*, 283 U.S. 697 (1931), prior restraints have been recognized as uniquely dangerous to our system of free expression. Unlike subsequent sanctions, prior restraints absolutely prevent the introduction of information into the marketplace of ideas, thereby impoverishing public discourse, preventing public discussion and promoting public ignorance. Indeed, the potential for widespread public igno-

rance made possible by a prior restraint acts as a constant temptation to government officials and public figures to use the device to cover up embarrassing or incriminating information. *Cf. Nebraska Press Ass'n v. Stuart*, 427 U.S. at 608 (Brennan, J., concurring).

Furthermore, the corrosive suspicion engendered by any resort to prior restraint inevitably introduces destabilizing rumors and widespread mistrust of government. It is no coincidence that the extraordinary stability of American institutions is linked to a system of free expression that permits citizens to have confidence that relevant information is not being kept from them on one pretext or another. It is the virtually total ban on prior restraints that has made possible such priceless confidence.

Recognizing the unique threat to a system of free expression posed by prior restraints, this Court has repeatedly refused to tolerate their existence. *See, e.g., Nebraska Press Ass'n v. Stuart*, 427 U.S. 539; *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975); *New York Times Co. v. United States*, 403 U.S. 713; *Organization for a Better Austin v. Keefe*, 402 U.S. 715 (1971); *Carroll v. President & Comm'rs of Princess Anne*, 393 U.S. 175 (1968); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963). Whether the context has involved military secrets, aesthetics, journalistic judgment, or politics, this Court has never sustained a prior restraint.

Given the extreme disfavor with which prior restraints have been viewed in this Court, *amicus* has urged that the Court announce a categorical ban on their use. Instead, the Court has maintained a narrow window of theoretical possibility, while erecting burdens of justification that have made it all but impossible to obtain a prior restraint. Thus, while it remains theoretically possible to obtain a prior restraint in narrowly circumscribed settings, an applicant must persuade a court (1) that an evil of transcendent importance will

inevitably flow from the speech in question; and (2) that no other way of averting the evil exists. On the facts of this case, it is impossible for General Noriega to carry his extremely demanding burden. Indeed, if the facts of this case are deemed sufficiently compelling to warrant a prior restraint, 60 years of carefully crafted jurisprudence of this Court will be eroded and our system of free expression severely wounded.

B. The Interests Asserted in Favor of the Prior Restraint

1. The Attorney-Client Privilege

General Noriega argues that a prior restraint is necessary to protect the confidentiality of the attorney-client relationship. While *amicus* agrees that the Sixth Amendment right to counsel carries with it a guaranty of confidential communication between lawyer and client, that confidentiality has been irrevocably shattered by the government's arguably improper taping of the conversations in question. The bedrock purpose of the attorney-client privilege is not to protect the reputational interests of clients, but to prevent an adversary from gaining an advantage by eavesdropping on communications between a lawyer and client. When the government deliberately taped General Noriega's conversations with his defense team, the government irrevocably breached the attorney-client privilege with respect to the information contained in those conversations. *Cf. Weatherford v. Bursey*, 429 U.S. 545 (1977). Not even a prior restraint can repair that injury. Thus, from the standpoint of the attorney-client privilege, the prior restraint does not repair the injury caused by government misconduct; it merely prevents the general public from learning of the extent and nature of the improper taping.

2. The Right to an Unbiased Jury

General Noriega also complains that the broadcast of his conversations with his defense team might jeopardize his right to an unbiased jury because prospective jurors may be tainted by exposure to prejudicial material. Once again, *amicus* agrees that the Sixth Amendment guarantees General Noriega a trial before a jury that is not tainted by exposure to prejudicial publicity. However, the issuance of a prior restraint is neither necessary nor appropriate to assuring that end.

Indeed, the trial court did not find that the *Nebraska Press* standards had been met. Instead, the trial court found, and the court of appeals agreed, that the *Nebraska Press* standards could not be applied unless CNN first turned over the tapes to the trial court for its evaluation. The trial court thereby provoked a confrontation with CNN, and the First Amendment, that could easily have been avoided.

The question of whether the press can ever be required to produce material in its possession for the court's inspection is a matter of substantial controversy. *See, e.g., Goldblum v. National Broadcasting Co.*, 584 F.2d 904 (9th Cir. 1978)(Kennedy, J.). But there is a general consensus that such a production order, if ever valid, must at least be based on a particularized showing of harm by the party seeking a prior restraint. As Justice Brennan wrote in the Pentagon Papers case:

> In no event may mere conclusions be sufficient; for if the Executive Branch seeks judicial aid in preventing publication, it must inevitably submit the basis upon which that aid is sought to scrutiny by the judiciary. And therefore, every restraint issued in this case, whatever its form, has violated the First Amendment -- and not less so because the restraint

> was justified as necessary to afford the courts an opportunity to examine the claim more thoroughly. Unless and until the Government has clearly made out its case, the First Amendment commands that no injunction may issue.

New York Times Co. v. United States, 403 U.S. at 727.

In this case, General Noriega not only failed to make a particularized showing of harm, he explicitly refused to do so. Thus, when the issue of reviewing the tapes first arose, General Noriega's counsel advised the trial court,

> if you are going to listen to the tape, you need to put it in context. Therefore, you are going to have to have me tell you my entire defense strategy. You are going to have to have me tell you how that tape fits within the broad category of defending General Noriega. Your are going to have to have me tell you the relevance. And that, most respectfully, I refuse to do.

App. 81a. However understandable that concern may be, it could have been solved by temporarily excluding the prosecutor from the courtroom and does not justify evading the rigorous requirements for a prior restraint that this Court has painstakingly erected over 60 years.

Moreover, even if one were to assume a worst-case scenario concerning the contents of the tapes, a prior restraint would not be justified. As in *Nebraska Press*, where the disclosure of an inadmissible confession was not deemed sufficiently threatening to warrant a prior restraint, the obvious remedy in this case is careful *voir dire* of prospective jurors to assure that they have not been tainted by any improper publicity. Such a remedy is all the more obvious since the notoriety of the circum-

stances surrounding General Noriega's seizure by armed invasion, the widespread publicity surrounding the government's seizure of his assets, and the public concern elicited by the government's taping of conversations with his lawyers render it a certainty that painstaking *voir dire* of the jury venire will be necessary. However, as with the recent trials of Marion Barry and Oliver North, experience has shown that a fair jury can be assembled despite the existence of a notorious defendant. Nothing in this record can justify the trial court's apparent assumption that only the drastic expedient of a prior restraint will make possible the empanelling of an unbiased jury.

The trial court's ruling substitutes a rule of convenience for a requirement of necessity in order to obtain a prior restraint and in so doing strikes a serious blow to our system of free expression.

CONCLUSION

For the reasons stated herein, petitioners' application for a stay should be granted and a writ of *certiorari* should issue to review and reverse the prior restraint entered in this case.

Respectfully submitted,

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Dated: November 16, 1990